

MISSISSIPPI LAW JOURNAL



THE DEDUCTIBILITY OF A CHARITABLE
CONTRIBUTION OF THE USE OF PROPERTY
UNDER THE FEDERAL INCOME TAX

Arthur B. Custy

A COMPARISON OF OIL AND GAS LEASING
AUTHORITIES IN THE GULF OF MEXICO
(STATES OF ALABAMA, MISSISSIPPI AND
LOUISIANA, AND THE FEDERAL GOVERNMENT),
AND THE JURISDICTIONAL CONFLICT OVER
THE BOUNDARY BETWEEN STATE AND FEDERAL
AUTHORITY IN THE GULF OF MEXICO

Jean R. Richey

MISSISSIPPI JURY SELECTION:
A PROPOSED STATUTE

John G. Corlew

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THE DEDUCTIBILITY OF A CHARITABLE CONTRIBUTION OF THE USE OF PROPERTY UNDER THE FEDERAL INCOME TAX

*Arthur B. Custy**

*"One owns not the things, but the right
and possession and enjoyment of the
thing."***

The Internal Revenue Code of 1954*** provides that gross income includes "all income from whatever source derived."¹ It is reasonable to assume that if a taxpayer wins in a contest the use of an automobile for a period of time, that he would be taxed thereon for the fair market value of such use; taxability of the receipt depends, of course, upon a finding that the receipt did not constitute a non-taxable gift under § 102 of the Code. The taxpayer would have received a valuable right or "payment" since the right to use the automobile is the only form of receipt he would have and, therefore, the only "payment" which the taxpayer could receive. The International Revenue Service would properly insist that the taxpayer include the fair market value of the use of the automobile in his gross income for the year of receipt.² While there appears to be no case law precisely on point, a number of cases indicate that such receipt would constitute taxable income to the taxpayer in the taxable year of receipt.

* Dean and Professor of Law, Willamette University. I wish to thank Leo A. Reinikka, Jr., a student at the Willamette University College of Law for his research assistance.

** TIFFANY, REAL PROPERTY §2 (3d ed. 1939).

*** Hereafter referred to as the Code.

¹ INT. REV. CODE of 1954, § 61(a).

² Treas. Reg. § 1.61-2(d) (i) (1968) provides that "If services are paid for other than in money, the fair market value of the property or services taken in payment must be included in income" Although this Regulation is immediately concerned with compensation for services, it illustrates the Service position that property received will be valued for income tax purposes at the fair market value on the date of exchange.

*Reynolds v. United States*³ held that an automobile, received by a taxpayer as part of a subscription campaign, given as a prize to a lottery winner, constituted income taxable in the year of receipt. *Revenue Ruling* 58-101⁴ reflects the Service position that the fair market value of a house received as a prize by an individual taking part in a contest is includable in the gross income of such individual for the year in which legal title is transferred or the benefits and burdens of ownership are received, whichever occurs first.⁵

Section 170 of the Code provides that "there shall be allowed as a deduction any charitable contribution (as defined in sub-section (c)) payment of which is made within the taxable year."⁶ In view of the fact that receipt of the "use" of property for a limited period of time constitutes taxable income, it would appear that a gift of similar use to a qualified charity⁷ would result in a charitable deduction under § 170.

Since 1948, however, the Service has maintained the position that donations of the use of property do not constitute deductible gifts within the meaning of § 170.

Permission to use and occupy property, granted to an organization described in section 23(o) of the Internal Revenue Code [of 1939], does not represent a payment made to or for the use of the organization within the meaning of that section ⁸

This position, first stated under the 1939 Code, is still that publicly expressed in various publications of the Service designed to assist the taxpayer in preparing his federal income tax returns. In a publication entitled *Valuation of Donated Property*⁹ the Service states that:

If you permit a charitable organization to use your property for a limited time, you may not deduct the value of its use. Thus . . . you may not deduct the value of the use of your land by a church for a picnic.

³ 118 F. Supp. 911 (N.D. Cal. 1954).

⁴ 1958-1 CUM. BULL. 233.

⁵ A number of cases have held that receipt of property in a contest can constitute taxable income. See *Sykes v. Commissioner*, 24 T.C. 1156 (1955); *Max Silver*, 42 B.T.A. 461 (1940) (taxpayer held to have received taxable income when he won a sum of money as the holder of a sweepstakes ticket which he had received as a gift from a friend). See also *I.T. 1667*, II-2 CUM. BULL. 83 (1921) (winner of an automobile given by a restaurant corporation in contest based upon drawing of tickets given for each meal served must report such as income).

⁶ INT. REV. CODE OF 1954, § 170(a)(1).

⁷ Section 170(c) of the 1954 Code sets forth the general types of organizations, contributions to which qualify for the deduction under the Code.

⁸ I. T. 3918, 1948-2 CUM. BULL. 33.

⁹ United States Treas. Dep't. Pub. No. 561 (10-68), at 6 (1968).

During the past few years the Service has seen the foundation of its prohibition in I.T. 3918¹⁰ severely shaken, if not destroyed. The current Service position with regard to the "use of property" is in direct conflict with decisions of the Tax Court of the United States,¹¹ the United States Federal District Court,¹² and the expressed intent of Congress.¹³ It would appear that I.T. 3918 has lost much, if not all, of its vitality, and the Service should re-examine its position in this area.

LEGISLATIVE HISTORY OF CHARITABLE DEDUCTIONS

In 1917 Congress for the first time enacted a provision in the revenue laws permitting a taxpayer who donated his property to charity to take a deduction therefor in computing his income taxes for the year. That amendment, sponsored by Senator Hollis of New Hampshire, read as follows:

Contributions or gifts actually made within the year to corporations or associations organized and operated exclusively for religious, charitable, scientific, or educational purposes, or to societies for the prevention of cruelty to children or animals, no part of the net income of which inures to the benefit of any private stockbroker or individual, to an amount not in excess of fifteen per centum of the taxpayer's taxable net income as computed without the benefit of this paragraph.¹⁴

In support of his amendment, the New Hampshire Senator told his colleagues:

Look at it this way: For every dollar that a man contributes for these charities, educational, scientific, or otherwise, the public gets 100 per cent; it is all devoted to that purpose. If it were undertaken to support such institutions through the Federal Government or local governments and the taxes were imposed for the amount, they would only get the percentage, 5 per cent, 10 per cent, 20 per cent, or 40 percent, as the case might be. Instead of getting the full amount they would only get a third or a quarter or a fifth.¹⁵

¹⁰ 1948-2 CUM. BULL. 33.

¹¹ Priscilla M. Sullivan, 16 T.C. 228 (1951), *acquiesced in*, 1951-1 CUM. BULL. 3; Mattie Fair, 27 T.C. 866 (1957), *acquiesced in*, 1957-2 CUM. BULL. 4.

¹² Passailaigue v. United States 224 F. Supp. 682 (M.D. Ga. 1963).

¹³ Discussed *infra*.

¹⁴ Revenue Act of 1917, 65th Cong., Sess. 1, ch. 63, tit. XII, § 1201(2), 40 Stat. 330.

¹⁵ 55 CONG. REC. 6728 (1917).

It was clear to the Congress that, with the high tax rates imposed to support the national effort in World War I, it would be necessary to provide an incentive to taxpayers if gifts to charitable organizations were to be forthcoming. An editorial from the *Washington Post* of August 25, 1917, inserted in the *Congressional Record* by Senator Hollis, sheds light on the problem then facing the Congress and the taxpayer:

If the Government takes all, or nearly all, of one's disposable or surplus income, it must undertake the responsibility of spending it, and it must then support all those works of charity and mercy and all the educational and religious works which in this country have heretofore been supported by private benevolence.¹⁶

Senator Hollis at first sought to allow the taxpayer a deduction of 20 per cent, but at the urging of Senator Simmons, the total deductible amount was reduced to the 15 per cent limit.¹⁷ The measure was passed by the Congress and became the basis for the current charitable contribution section in the internal revenue laws.

Senator Hollis was not the first to recommend to Congress that gifts to charity be given special tax treatment. In 1913 Congressman Rogers of Massachusetts sponsored a bill similar to the one enacted in 1917. Rogers, in seeing the necessity of encouraging charitable giving by individual citizens, said:

If a man wants to make a gift to charity, he ought to be encouraged to so do and not discouraged. He ought to be urged to make such a gift rather than be penalized for doing so.¹⁸

Congress rejected Rogers' proposal, but it helped set the stage for the passage of the charitable contributions amendment in the Revenue Act of 1917.

Since 1917, the Congress has periodically *expanded* the charitable deductions allowed to taxpayers. From a reading of the legislative his-

¹⁶ *Id.* The Senator also presented a number of other editorials, from influential newspapers, which carried messages of similar import.

¹⁷ *Id.* at 6729. It should at this point be noted that the Act of 1917 made no provision for deductions by corporations donating to charities; it also contained no special limit for gifts to certain "publicly supported" charities (*see* Int. Rev. Code of 1954, § 170(b) (1) (A)); had no provision for unlimited deductions for certain individuals (*see* § 170(b)(1)(c)); and made no provision carrying over excess contributions made in the taxable year (*see* § 170(b)(5)).

¹⁸ 50 CONG. REC. 1259 (1913).

tory¹⁹ of the current law, it is apparent that whenever there has been a conflict, with one taxpayer being allowed a deduction when another was not, the Congress has acted to permit both taxpayers a deduction, rather than neither. As early as 1918, an amendment was added to the law to permit more charitable organizations to receive benefits from the provisions governing charitable gift-deductions. The Revenue Act of 1918 enlarged the charitable deductions section to include gifts to the special fund for vocational rehabilitation under the Vocational Rehabilitation Act.²⁰

In the Revenue Act of 1924,²¹ Congress introduced the unlimited deduction provision for certain taxpayers who gave more than 90 per cent of their income in contributions and taxes in the preceeding 10 years.²² In the 1936 Act²³ Congress authorized corporations to deduct their contributions to qualified charities. The delay in the enacting of the corporate deduction provision can perhaps be partly attributed to the myth that gifts by corporations were prohibited or at least disfavored by the law;²⁴ nevertheless, the 1936 Act allowed corporations a five per

¹⁹ SEIDMAN, LEGISLATIVE HISTORY OF FEDERAL INCOME AND EXCESS PROFITS TAX LAWS (2 vols.; New York: Prentice-Hall, Inc., provides a source of research material in the development of charitable contributions and deductions under the internal revenue laws).

²⁰ 40 Stat. 619.

²¹ Sec. 241 (a)(10); Pub. L. No. 176, 68th Cong., Sess. 1, 2, ch. 234, 43 Stat. 253 (June 2, 1924). As modified, this provision appears in § 170(b)(1)(C). This provision is frequently called the "Philadelphia Nun" provision, because it is said to have been enacted for the benefit of a woman pledged to poverty under her religious order. She was unable to make an assignment of her interest in a family trust that would be effective for tax purposes because of the spendthrift clause. See I. T. 4035, 1950-2 CUM. BULL. 60; BITTKER, FEDERAL INCOME, ESTATE AND GIFT TAXATION, 174, 175 (1964).

²² In 1954 the unlimited deduction section was broadened to permit the unlimited deduction if gifts in the taxable year and in eight of the preceeding ten years, when added to taxes, exceeded 90 per cent of net income. INT. REV. CODE OF 1954, § 170(b)(1)(C). "However specialized its origin, § 170(B)(1)(C) appears to have attracted more general interest, judging from the esoteric limitations imposed on it in 1964 by the enactment of § 170(g)." BITTKER, *supra* note 21 at 175.

²³ Revenue Act of 1936, 74th Cong., Sess. 2, ch. 690, tit. I, § 23(q), 49 Stat. 1648, 1661.

²⁴ The common law rule was that those who managed a corporation could not disburse any corporate funds for philanthropic or other worthy public causes unless the disbursement would result in benefit to the corporation. See *Hutton v. West Cork Ry.*, 23 Ch. D. 654 (1883); *Dodge v. Ford Motor Co.*, 204 Mich. 459, 170 N.W. 668 (1918); BALLANTINE, CORPORATIONS, 228 (rev. ed. 1946). Although courts have hesitated to overrule the common law position, recent decisions have found that such gifts can reasonably be found to promote corporate objectives. See *Cousens, How Far Corporations May Contribute to Charity*, 35 VA. L. REV. 401 (1949).

cent deduction.²⁵ Noteworthy is the political byplay which occurred on the floor of Congress over which political party should be given credit for the corporation deduction amendment. Said Republican Congressman Treadway:

Finally, the wisdom of the Democratic side recognized the merit of this amendment, and the reason they did . . . was that the influence of the President [F.D.R.] did not prevail over the influence of the mass of the public who wanted this exemption for charitable institutions. They did not dare stand back of their President in the final showdown, and this is the reason the amendment is put in here.²⁶

In support of the amendment, Representative Kramer of California stated that he was "heartily in favor" of it. "In my State the community chest and other charitable organizations have been greatly aided by such contributions, and the amendment recognizes their fine service."²⁷ The amendment as passed underscores further the intent of Congress that charitable contributions are to be encouraged, even if it was necessary to face an intra-party fight between the White House and the Hill.

In 1938 Congressman Reed of New York, speaking in favor of making certain revokable trusts deductible, said that "if this amendment is not adopted to *encourage* these philanthropies, the public is going to pay much more. It is going to pay millions and millions of dollars." (emphasis added).²⁸ The amendment was rejected, partly, at least, due to the fear of Congressman Fred M. Vinson and others, that the trust provision would give the taxpayer a real tax benefit without giving any assurance that the charities would receive a material benefit.²⁹ The discussion involved, in part, illustrates the feeling of Congress that the purpose of the tax benefits of the charitable deduction provisions is *not* to provide a taxpayer with a tax benefit; the purpose is to *encourage giving* to charities in order that the *charities may receive a benefit*. It seems clear that if the charity is not to receive a material benefit from the gift, it is not the intent of Congress that the taxpayer be allowed a deduction. The converse appears to be equally true—if the charity receives material benefit from the gift, the Congress intended that the

²⁵ INT. REV. CODE of 1954, § 170(b)(2) continues the five per cent limitation of charitable deductions by corporations. A five year carry-over provision allows a corporation making larger gifts to deduct them in later years under special, carefully controlled conditions. Section 170(b)(5) has a similar provision for gifts by individuals.

²⁶ 79 CONG. REC. 12424 (1935).

²⁷ 79 CONG. REC. 12423 (1935).

²⁸ 83 CONG. REC. 3070 (1938).

²⁹ *Id.*

taxpayer be allowed a deduction from his income of the value of that gift.

Further evidence of the congressional intent with this portion of the tax law can be found in Senate Report No. 1567³⁰ relative to an attempt by the House to value property given to charities at the donor's basis, rather than at fair market value.³¹ The report states:

Representations were made to the Committee by officials of educational and charitable institutions that the effect of such a provision would be to discourage the making of charitable gifts in kind. The Committee believes that charitable gifts generally ought to be encouraged and so has eliminated this provision from the House Bill.³²

In support of the proposed change, the Ways and Means Committee of the House of Representatives argued as follows:

If a charitable contribution is made in property other than money the donor is permitted to deduct the value of the property at the time of the gift, and is not limited to the cost of the property to him. It is, therefore, to the donor's advantage to make contributions in securities and other property which have appreciated in value and in this way avoid tax upon the unrealized capital gain. There is no justification in principle for the allowance of a deduction for the amount of the unrealized appreciation which has never been included in taxable income.³³

The taxpayer-donor receives a deduction for an increase in value of the property donated, which increase he has never reported for income tax purposes. It is equally true, however, that the charity has received something which is worth more than the taxpayer's cost or other basis. Congress evidently felt that the deduction should be the *value received*

³⁰ 75th Cong. 3d Sess. 14 (1938); reproduced in 1939-1 CUM. BULL. (part 2) 779.

³¹ Treas. Reg. § 1.170-1(c)(1) (1968): "If a contribution is made in property other than money, the amount of the deduction is determined by the fair market value of the property at the time of the contribution." This provision provides encouragement to donors to give property which has appreciated in value. The donor is allowed a deduction of the fair market value, but realizes no taxable gain. "A gift of appreciated property does not result in income to the donor so long as he gives the property away absolutely and parts with title thereto before the property gives rise to income by way of a sale." Humacid Co., 42 T.C. 894, 913 (1964). For discussion of the "fair market value" concept, see Lewis, *Income Realization and Charitable Contributions: The Economics of Altruism*, 54 Geo. L.J. 482, 496 (1966).

³² S. REP. No. 1567, 75th Cong., 3d Sess. 14 (1938); reproduced in 1939-1 CUM. BULL. (part 2) 779, 789.

³³ H. R. REP. No. 1860, 75th Cong. 3d Sess. 35 (1938); reproduced in 1939-1 CUM. BULL. (part 2) 728, 742.

by the charity, rather than the cost of the gift to the taxpayer. The proposal of the Ways and Means Committee was rejected, leaving the existing Regulations in effect.

In 1952 Congress acted to increase the maximum deduction from the 1917 limit of 15 per cent to 20 per cent.³⁴ The purpose of this change in the law was to give "much-needed relief . . . to colleges, hospitals, and other organizations which are becoming more and more dependent upon private contributors to enable them to balance their budgets and carry on their programs."³⁵ The Finance Committee recognized "[t]he plight in which many of our educational institutions find themselves at the present time . . . due to the fact that their endowment income is inadequate to meet rising costs."³⁶

Public Law 408,³⁷ enacted in 1956, changed the unlimited deduction section of the Code³⁸ in such a manner as to make the period involved eight of ten rather than the original ten of ten consecutive years enacted in 1922.³⁹ This new provision was adopted to apply prospectively. In support of the change, the Finance Committee referred to the old law as being "too restrictive." This is but another example of the continued congressional policy of loosening, rather than tightening, the reins on the charitable deduction provisions of the Code.

The legislative history of the charitable contributions provision of the Code reflects a gradual growth evidencing a congressional intent to favor charities by encouraging charitable giving and simultaneously recognizing the "good works" of the taxpayer. Implicit in the Code is the fact that the taxpayer is permitted to exercise a great deal of individual freedom in selecting his favorite charity as the object of his bounty. The echo of Congressman Rogers' remarks is louder today than when he first uttered them:

If a man wants to make a gift to charity, he ought to be encouraged to do so and not discouraged. He ought to be urged to make such a gift rather than be penalized for doing so.⁴⁰

JUDICIAL INTERPRETATION OF CONGRESSIONAL INTENT

The courts recognized very early that the purpose of Congress in enacting the charitable deduction provisions of the revenue laws was

³⁴ Act of July 8, 1952, Pub. L. No. 82-465, 66 Stat. 443; INT. REV. CODE OF 1954, § 170 (b)(1)(B).

³⁵ S. REP. NO. 1584, 82d Cong. 2d Sess. (1952).

³⁶ *Id.*

³⁷ Act of Feb. 15, 1956, Pub. L. No. 408, 70 Stat. 15.

³⁸ INT. REV. CODE OF 1954 § 170(b)(1)(C).

³⁹ See S. REP. NO. 1584 *supra* note 35, at 3, for discussion of the 1924 provision.

⁴⁰ 50 CONG. REC. 1259 (1913).

to encourage gifts to charity.⁴¹ In *United States v. Provident Trust Company*⁴² Mr. Justice Sutherland stated that the statutory provisions concerning bequests and taxes demonstrate a congressional intent to encourage charitable bequests. In the mid-Depression case of *Helvering v. Bliss*⁴³ the Supreme Court clearly expressed its position with regard to the charitable deductions section of the revenue laws. The Court noted that Congress, in the Act of 1917, in order to encourage gifts to religious, educational and other charitable objects, granted the privilege of deducting such gifts from gross income, with the limit of 15 per cent of the taxpayer's net income. Mr. Justice Roberts, speaking for the Court stated:

The exemption of income devoted to charity and the reduction of the rate of capital gains were liberalizations of the law in the taxpayer's favor, were begotten from motives of public policy, and are *not* to be narrowly construed. (emphasis added).⁴⁴

A few years later the Court again expressed the view that charitable contribution provisions of the law ought not be given a narrow construction. In *Old Colony Trust Company*⁴⁵ the Court noted that it was the congressional purpose in the internal revenue laws to encourage charitable contributions by allowing charitable deductions by trust estates; it further noted that to hinder the law's liberal intention might dissuade potential donors from contribution through the medium of trust estates.⁴⁶

A number of federal courts have expressly noted that the motive of Congress was to encourage charitable giving, and that such intention should be given full effect; a narrow construction of the charity provisions would serve to defeat such intent. These decisions all agree, in effect, with language found in *Estate of Whitehead v. Commissioner*:⁴⁷ "Tax provisions as to charities are begotten from motives of public policy and are not to be narrowly construed."⁴⁸

⁴¹ *Edwards v. Slocum*, 264 U.S. 61 (1924).

⁴² 291 U.S. 272 (1934).

⁴³ 293 U.S. 144 (1934).

⁴⁴ *Id.* at 150.

⁴⁵ 301 U.S. 379 (1937).

⁴⁶ *Id.* at 384.

⁴⁷ 3 T.C. 40 (1944), *aff'd*, 147 F.2d 977 (1945).

⁴⁸ *Id.* at 48. Expressions of the judicial "policy" of giving liberal construction to the charity provisions of the Code can be found in the following cases: *Faulkner v. Commissioner*, 112 F.2d 987 (1st Cir. 1940); *Harrison v. Baker Annuity Fund*, 90 F.2d 286 (7th Cir. 1937); *Cochran v. Commissioner*, 78 F.2d 176 (4th Cir. 1935); *Sheppard v. United States*, 361 F.2d 972 (Ct.Cl. 1966); *Beggs v. United States*, 27 F. Supp. 599 (Ct.Cl. 1939); *Bowman v. Commissioner*, 16 B.T.A. 1157 (1929).

It should be noted that the Internal Revenue Service has itself recognized the congressional intent to encourage charitable contributions through the use of the federal tax laws. The Service has said:

The charitable contributions section of the 1917 Act was placed in the statute for the purpose of encouraging contributions to charitable organizations during the war. . . . It was clearly the intent of Congress to encourage such gifts.⁴⁹

THE DONATION OF THE USE OF PROPERTY—DEDUCTIBILITY

The Service maintains, and has done so for over twenty years,⁵⁰ that if a taxpayer permits "a charitable organization to use [his] property for a limited time, [he] may not deduct the value of its use. Thus . . . [he] may not deduct the value of the use of [his] land by a church for a picnic."⁵¹ The Service states that such a gift is not a "payment" as required by the Code, and that, because there is no payment, there is no "contribution or gift" within the meaning of the Code.⁵² The Code⁵³ defines a charitable contribution to mean "a contribution or gift to or for the use of" one of the qualified charitable organizations defined § 170(c). It does not, therefore, appear that the term "payment" was intended to be a part of the definition of the term "charitable contribution" within the understanding to be used in enforcing the Code's provisions.

I.T. 3918, which sets forth the Service position on this question, provides as follows:

Permission to use and occupy property, granted to an organization described in section 23 (o) of the Internal Revenue Code [of 1939], does not represent a payment made to or for the use of the organization within the meaning of that section, and the owner of the property is not entitled to deduct, in his Federal income tax return, the value of such use and occupancy.⁵⁴

⁴⁹ L.O. 1118, II-2 CUM. BULL. 148, 150 (1923). *Lewyt Corp. v. Commissioner* 349 U.S. 237, 240 (1966). Douglas, J.: "Congress may be strict or lavish in its allowance of deductions or tax benefits. The formula it writes may be arbitrary and harsh in its applications. But where the benefit claimed by the taxpayer is fairly within the statutory language and the construction sought is in harmony with the statute as an organic whole, the benefits will not be withheld from the taxpayer though they represent an unexpected windfall."

⁵⁰ See I.T. 3918, 1948-2 CUM. BULL. 33.

⁵¹ *Valuation of Donated Property*, *supra* note 9.

⁵² Section 170(a)(1) allows as a deduction any charitable contribution "payment of which is made within the taxable year." (emphasis added).

⁵³ INT. REV. CODE of 1954, § 170(c).

⁵⁴ 1948-2 CUM. BULL. 33.

The Service, in its explanation for this position, gives no definition of the term "payment," but an examination of the legislative history of the term indicates that Congress intended the word to signify the time at which the deduction could be taken, and not the event (such as a presentment) which gives rise to a "contribution."

It apparently was the purpose of Congress in enacting § 23 (o) and (q) in the Revenue Act of 1938 to put the accrual basis taxpayer in the same position as the cash basis taxpayer when reporting charitable deductions; such deductions were to be taken, not when the obligation to pay accrued, but *when the actual payment was made*.

It can reasonably be argued, as did Judge Atkins in his concurring opinion in *Norman Petty*⁵⁵ that the language "payment of which is made within the taxable year" is intended to establish the time when the deduction is to be taken, and not to answer the question of whether the transfer of the corpus of the gift constitutes a charitable contribution.

In House Report No. 1860,⁵⁶ quoted by Judge Atkins in *Petty*, it was stated:

'Under the various revenue acts the deduction for contributions is allowed for the taxable year in which the contribution is made. Hence, a taxpayer on the accrual basis of accounting may claim that he is entitled to a deduction for the amount of a charitable pledge in one year, although he does not actually pay it until a later year, or indefinitely postpones payment. The doubt and confusion in such cases is aggravated by reason of the uncertainty and diversity in the law of the various States on the question as to when the liability of a subscriber to a charitable fund is fully incurred. In the interest of certainty in the administration of the revenue laws, it is desirable to dispel this confusion by enacting a clear and uniform statutory rule to govern this situation.

'The bill provides that the deduction for contributions or gifts for charitable and other purposes shall be allowed only for the taxable year in which the contribution is actually paid regardless of whether the taxpayer is reporting income on the cash or accrual basis. The allowance of the deduction in the year when actually paid will provide a clearer rule without hardship to the taxpayer and will eliminate the uncertainty in the administration of the deduction.'⁵⁷

The House Report provides further that if a charitable contribution "is made in property other than money the donor is permitted to deduct the value of the property *at the time of the gift*." (emphasis added).⁵⁸

⁵⁵ 40 T.C. 521 (1963).

⁵⁶ H. R. REP. NO. 1860, 75th Cong., 3d Sess. 19 (1938).

⁵⁷ 40 T.C. 521, 524 (1963).

⁵⁸ H. R. REP. NO. 1860, 75th Cong., 3d Sess. 35 (1938).

It seems clear from these statements of the Committee that the term "payment," rather than referring to an "event" as such, refers to the time when the deduction for the gift is to be allowed. The deduction is allowed in the year in which the transfer is made—when there has been payment—and not when the mere obligation to pay becomes fixed or is otherwise incurred. In *United States v. Consolidated Edison*⁵⁹ the Supreme Court said "Payment" is not a talismatic word. It may have many meanings depending upon the sense in which it is used."⁶⁰ In *Wasatch Chemical Company*⁶¹ it was stated that "[t]he act of payment for tax purposes, and generally, may be accomplished by the transfer of funds directly or by check."⁶² The Tax Court in *Wasatch Chemical* held that the delivery of a five-year promissory note was not payment within the meaning of § 404⁶³ of the Code. The court of appeals, reversing, held that it did constitute payment. In *P. G. Lake, Inc. v. Commissioner*⁶⁴ it was stated that the ordinary and usual meaning of the word "paid" is "to liquidate a liability in cash."⁶⁵ It is believed that when one incurs a liability to a charitable organization in the form of a promise to allow use of property, such liability can be liquidated by transfer of such property to the charity for the period promised.

The language of the House Report quoted above, and the definitions given the terms "payment" and "paid" would seem to indicate that when Congress used the term "payment" it intended merely to establish the time when the deduction could be taken.

In explaining its position in I.T. 3918, the Service says:

It is the view of this office that permission to use and occupy property granted to an organization described in section 23 (o) of the Code does not represent a *payment* made to or for the use of the organization within the meaning of that section. Such an arrangement does not constitute a gift of property. It is merely the granting of a privilege for which no charge is made.⁶⁶

⁵⁹ 366 U.S. 380 (1961).

⁶⁰ *Id.* at 391.

⁶¹ 37 T.C. 817 (1962), *rev'd*, 313 F.2d 843 (10th Cir. 1963).

⁶² *Id.* at 819.

⁶³ Section 404, INT. REV. CODE of 1954 deals with "Deduction for Contributions of an employer to an employees' trust or annuity plan and compensation under a deferred-payment plan."

⁶⁴ 148 F.2d 898 (5th Cir. 1945), *cert. denied*, 326 U.S. 732 (1945).

⁶⁵ See *Helvering v. Price*, 309 U.S. 409, 413 (1940); *Eckert v. Burnet*, 283 U.S. 140, 141, 142 (1931); *Quinn v. Commissioner*, 111 F.2d 372 (5th Cir. 1940); *Slaymaker Lock Co. v. Commissioner*, 18 T.C. 1001, 1006 (1952).

⁶⁶ 1948-2 CUM. BULL. 33, 34.

The taxpayer and the Service appear to have joined issue, then, on the question: May permission to use and occupy property constitute a gift of property the fair market value of which is deductible as a charitable contribution under the Code when the gift is made to a qualifying organization?

Treasury Regulations, § 1.170-1(c)(1), recognize the well established rule that contributions to be deductible need not be made in cash, but may be made in property other than cash, with the amount of the deduction to be the fair market value of the property on the date of the gift. For the use of property to constitute a gift, it must be determined that such user constitutes "property." It appears that the courts regard the use of property as property. In *United States v. General Motors Corporation*,⁶⁷ the Supreme Court held that where the government under the Second War Powers Act of 1942 took temporary use of General Motors' property, held through a leasehold, compensation was required. The right to occupy the property for a year, a month, or for a series of years, without reference to actual use, need, or arrangement was said to have a value. The United States government was required to make compensation for such occupancy and use.

In many cases the right to use and occupy property has been termed "property" or "a property right."⁶⁸ There are also a large group of cases which hold that the use of property constitutes "property" or is at least one of the incidents of property. *United States v. Finn*⁶⁹ held that the United States government would have to pay for the use of an airplane which it had wrongfully taken from the owner. The amount to be paid was the fair rental value of the plane for the period used. The use of the plane was said to constitute a "taking" of property for which compensation must be made under the fifth amendment. In *Orr v. United*

⁶⁷ 323 U.S. 373 (1945).

⁶⁸ The right to use and occupy property has been termed "property" or "a property right": *Superior Bath House Co. v. McCarrol*, 312 U.S. 176 (1941), (The privilege of use is only one attribute among many of the bundle of privileges that make up property or ownership.); *Washington v. Roberage*, 278 U.S. 116 (1928), (The right to devote land to any legitimate use is property within the protection of the Federal Constitution.); *Buchanan v. Warley*, 245 U.S. 60 (1917), (Property includes the right to acquire, use and dispose of the physical thing; it includes the free use, enjoyment, and disposal of one's acquisitions without control or diminution except by the law of the land.); *In Re Crook*, 219 F. 979 (W.D. Wash. 1915), (Property includes the exclusive right of possession, enjoyment, and disposal of the object.); *United States v. Graham*, 96 F. Supp. 318 (S.D. Cal. 1951), (Property is a word of broad meaning and may reasonably be construed to include obligations, rights, and other intangibles, as well as the physical thing.).

⁶⁹ 127 F. Supp. 158 (S.D. Cal. 1954).

States ⁷⁰ it was said that "property" is a bundle of rights and duties; the right to use the property is one of the most valuable attributes of property. Thus, it appears that the courts, if not the Service itself, regard the use of property to be property, at least within the meaning of the Federal Constitution.⁷¹

In I.T. 3918 the Service says that the grant of permission to use property does not constitute a "gift of property."⁷² From the language of a number of courts, it can be concluded that such permission does indeed constitute *property*. It is undoubtedly true that by freely granting permission to use property, the grantor can be making a "gift" as required by § 170.

In *Edson v. Lucas* ⁷³ the Eighth Circuit stated the requirements of a gift as follows:

[T]here is not complete harmony in the decisions as to the requirements necessary to constitute a valid gift *inter vivos*, but certain of the essential elements are not disputed. There must be a donor competent to make a gift, a clear and unmistakable intention on his part to make it, a donee capable of taking the gift, a conveyance, assignment, or transfer sufficient to vest legal title in the donee, without power of revocation at the will of the donor, and a relinquishment of dominion and control of the *subject matter* of the gift by delivery to the donee. (emphasis added).⁷⁴

A donor of the use of his property can convey to a charitable donee such rights as would meet the requirements of a gift. At times it may be difficult to determine if a "gift" has been made under the Code. For example, when a corporation gives to the widow of its former president a stipend, whether it is excludible from income under § 102 of the Code as a gift, or is includible under § 61 as income has caused the federal courts considerable difficulty. There can be little doubt, however, that when a taxpayer donates the use of his property to a charity without

⁷⁰ 343 F.2d 553 (5th Cir. 1965).

⁷¹ *Bellows v. Commissioner*, 26 CCH TAX CT. REP. 978 (1967) allowed the owner of an apartment building a § 162 business expense for the rental value of an apartment unit occupied by the manager. The court stated, *inter alia*, that where property is used to pay for an item, the transaction gives rise, not only to a deduction, but also to realization of income on such use of property.

⁷² 1948-1 CUM. BULL. 33, 34.

⁷³ 40 F.2d 398 (8th Cir. 1930).

⁷⁴ *Id.* at 404. For various definitions of the elements necessary to constitute a gift, see, *Blair v. Rasserter*, 33 F.2d 286 (9th Cir. 1929); *Bingham v. White*, 31 F.2d 574 (D. Mass. 1929); *Ratterman v. Lodge*, 13 F.2d 805 (8th Cir. 1926); *Parrott v. Noel*, 8 F.2d 368 (E. D. Va. 1925); *Miller v. Herzfeld*, 4 F.2d 355 (3d Cir. 1925).

charge, he is making a gift—something considerably more than “the granting of a privilege for which no charge is made.”

Mattie Fair,⁷⁵ *Sullivan v. Commissioner*,⁷⁶ and *Passailaigue v. United States*⁷⁷ demonstrate the reluctance of the federal courts to deny a deduction where the taxpayer has in fact transferred the use of his property, even if only for a limited time.

It is important to note that *Fair*, *Sullivan*, and *Passailaigue* involved “use” of *real* property; “Where the use of personal property has been involved, the Commissioner has fared much better.”⁷⁸ The cases involving personal property involved attempts by the taxpayer to deduct depreciation of vehicles used in service for charitable purposes. When one considers the full import of the *Fair*, *Sullivan*, and *Passailaigue* cases, however, it appears that the taxpayer who relinquishes control over his vehicle and thereafter seeks a deduction for the rental value thereof, may well be permitted such a deduction by the federal courts.

SULLIVAN

In *Sullivan*, the taxpayer owned certain real property which she conveyed, without consideration through a “straw man” to the American Red Cross for use by it for the duration of World War II, or until it ceased to be used as headquarters for the local Red Cross chapter. Upon termination, the property would revert to the taxpayer. The donor claimed deductions for charitable contributions in 1942 and 1943 of the fair rental value of the property. The Commissioner disallowed the deductions, but the Tax Court was of the opinion that the Red Cross was “given a present, immediate, irrevocable interest in the property of indefinite duration.”⁷⁹ It was determined that the donor was entitled to a deduction, in 1942, of the fair rental value of the property for that year. The deduction sought for later years was denied on the ground that the gift in 1942 was a completed gift in that year.⁸⁰

⁷⁵ 27 T.C. 866 (1957).

⁷⁶ 16 T.C. 228 (1951).

⁷⁷ 224 F. Supp. 682 (M.D. Ga. 1963).

⁷⁸ See the excellent article by Eliasberg, *Section 170: Recent Developments on “What,” “When,” and “How Much” of Charitable Giving*, 44 TAXES 418, 436 (June 1966).

⁷⁹ 16 T.C. 228, 231 (1951).

⁸⁰ *Id.* The gift was that of a determinable fee and therefore was an estate in land—property in any sense of the word. Perhaps Mrs. Sullivan should have sought a deduction in 1942 of the full rental value of the property for the duration. Of course, to do so it would have been necessary to know when the use by the Red Cross would actually cease.

It appears that despite the court's unwillingness to concede fully that the transfer constituted a gift of the rental value of the property during the years in question, the ultimate disposition of the case implied tacit recognition of such a view. The Code requires that the gift must be "paid" within the taxable year for the taxpayer to be entitled to a deduction. In *Sullivan*, the "payment" was made when the conveyance was made; it was at that time that Mrs. Sullivan needed to determine the value of the gift she had given.

MATTIE FAIR

In 1957 the Commissioner was again faced with a taxpayer who wished to be allowed a deduction for a gift of the use of property for an indefinite period of time. *Mattie Fair*⁸¹ involved a conveyance without consideration to the charitable Fair Foundation of the perpetual right to build and maintain an additional five stories on an existing two-story building owned by the taxpayers. The instrument of conveyance recited the intention of the taxpayers to grant to the Foundation the perpetual right to erect, maintain, own, and use the additional floors. Ownership of the building, however, was retained by the donors, who sought a charitable deduction for the gift. The Commissioner denied the deduction, implicitly relying upon I.T. 3918. The Tax Court held that that which was given constituted a charitable contribution within the meaning of § 23 (o) of the 1939 Code, and as such, the value thereof was deductible within the limits of the Code.

The Court did not specifically mention I.T. 3918 in reaching its decision. It appears that the basis of the Commissioner's argument was that the rights and interests conveyed did not constitute property. The opinion of the Tax Court states:

We cannot agree. Property is the sum of rights and powers incident to ownership. The right to use the airspace superjacent to the ground is one of the most valuable rights connected with the ownership of land since the value of commercial property consists almost exclusively of the right of the owner to erect business and industrial structures thereon. The sale or lease of superjacent airspace is not at all uncommon in large cities. . . . [T]here does not seem to be any policy of the law prohibiting these transactions and their validity has been recognized. . . . [I]n view of the foregoing and the fact that the rights and interests conveyed gave the Foundation a present irrevocable interest in the property. . . . We hold that the conveyance of the rights and interests named in the written instrument was

⁸¹ 27 T.C. 866 (1957), *acquiesced in* CUM. BULL. 4.

a gift within the contemplation of section 23 (o) of the 1939 Code. (citations omitted).⁸²

The Tax Court, it appears, is of the opinion that where the taxpayer gives something less than absolute ownership of property—when he gives a “right or incident of” ownership—he is entitled to a charitable deduction under the Code.

PASSAILAIGUE

In 1963 before the United States District Court of the Middle District of Georgia, the question was again litigated. *Passailague v. United States*⁸³ is a case which states *express* disapproval of the Service's present position. Jack Passailague leased certain property, with a rental value of \$250 per month, to the Youth Craft Shop, Inc., an organization qualifying under § 170(c) of the Code. The written lease contained the usual covenants, with the proviso that the property was limited in use to charitable, educational, and eleemosynary purposes. The instrument provided that the Shop would have use of the property rent-free. The lease provisions gave the charity much less assurance of continued use than existed in either *Mattie Fair* or *Sullivan*. Youth Craft was to have use of the property until such time as the landlord desired to retake possession of the premises and evidenced such desire to terminate the lease by providing Youth Craft with fifteen days written notice that the use and occupancy by Youth Craft was to terminate.⁸⁴ The Commissioner based his denial of the deduction on the ground that since the taxpayer did not part with the title to his property, but granted only the use and enjoyment of the property under the lease, no gift was made, but rather, “[i]t was merely the granting of a privilege.”⁸⁵

The court rejected the Commissioner's position, concluding that the “intent of Congress referred to by the Supreme Court in *Bliss*⁸⁶ and *Pleasants*⁸⁷ embraces the circumstances of this transaction and . . . the charitable gift made by the taxpayer is clearly a deductible donation within the meaning of § 170 of the Internal Revenue Code.” (footnotes added).⁸⁸ While the vehicle of gift took the form of a lease, the court indicated that the substance of what was accomplished and not the form was the important consideration. There was a transfer of a valuable right to use the property.

⁸² *Id.* at 872.

⁸³ 224 F. Supp. 682 (M.D. Ga. 1963).

⁸⁴ *Id.* at 683.

⁸⁵ *Id.* at 684.

⁸⁶ *Helvering v. Bliss*, 293 U.S. 144 (1934).

⁸⁷ *United States v. Pleasants*, 305 U.S. 357 (1939).

⁸⁸ *Passailague v. United States*, 224 F. Supp. 682, 687 (M.D. Ga. 1963).

The court considered carefully the Commissioner's contention that the gift involved was not such as to qualify as a "contribution or gift" within the meaning of § 170. The court stated that

"Property" is more than just the physical thing—the land, the bricks, the mortar—it is also the sum of all the rights and powers incident to ownership of the physical thing. It is the tangible and the intangible. Property is composed of constituent elements and of these elements the right to *use* the physical thing to the exclusion of others is the most essential and beneficial. (emphasis supplied by the court).⁸⁹

The district court continued its assault on the Service position by comparing the Commissioner's argument with an argument that the right to remove the oil from an oil well is "merely" a privilege, with the only real important thing being ownership of the hole in the ground. The court said that there is "equal logic" in both arguments.⁹⁰

The *Passailaigue* court was expressly of the opinion that I.T. 3918 had been overruled in *Sullivan*. In *Sullivan* "the Court carried out the broad intent of Congress to encourage charitable contributions and of liberally construing the charitable donations provisions of the Revenue Code."⁹¹

The Service has acquiesced in *Sullivan* and *Mattie Fair*,⁹² but has declined to change its published position on the question of gifts of the use of property even in the face of *Passailaigue*.

THE USE OF PERSONAL PROPERTY

"The Commissioner has lost every case in which he has attempted to deny a taxpayer the fair rental value of real property which the taxpayer has made available to a section 170 organization."⁹³ But, "[w]here the use of personal property has been involved, the Commissioner has fared much better."⁹⁴ In the cases of *Orr v. United States*⁹⁵ and *Mitchell v. Commissioner*⁹⁶ the donors were denied deductions for depreciation and maintenance expenses on their automobiles and other vehicles which were used in work for charitable causes. In each case the taxpayer was

⁸⁹ *Id.* at 686.

⁹⁰ *Id.*

⁹¹ *Id.* at 687.

⁹² 1951-1 CUM. BULL. 3; 1957-2 CUM. BULL. 4.

⁹³ Eliasberg, *Section 170: Recent Developments on "What," "When," and "How Much" of Charitable Giving*, 44 TAXES 418, 435 (June 1966).

⁹⁴ *Id.* at 436.

⁹⁵ 226 F. Supp. 809 (M.D. Ala. 1963), *aff'd*, 343 F.2d 553 (5th Cir. 1965).

⁹⁶ 42 T.C. 953 (1964).

performing a service for the charity and used the vehicle in that cause. As such, the taxpayer-donors did not relinquish control over their vehicles, but instead personally used the vehicles, and sought deductions for the depreciation, prorated to such use.⁹⁷ In *Orr*, the court of appeals recognized the deductibility of gifts of the use of property, and expressed approval of the *Sullivan*, *Mattie Fair*, and *Passailaigue* cases. The court declined to allow the deduction, however, because the taxpayer, rather than the charity had actual use of the vehicles. Mr. Orr, in fact, did not seek a deduction for the rental value of the vehicle while it was in the use of the charity. Rather, he sought to deduct the depreciation. Depreciation, said the court, is "not a 'payment', not a transfer of money or property."⁹⁸ Since the charitable organization had neither control nor possession of the vehicle, ". . . we cannot hold that, for purposes of a charitable deduction, the church was using the taxpayer's vehicles."⁹⁹

This language appears to imply that if the taxpayer *had* relinquished control over his vehicle—personal property—he may well have been allowed a charitable deduction therefor. The *Mitchell* case, decided by the Tax Court, was of similar import. There, the court held that depreciation did not constitute a payment, was not an out of pocket expense or expenditure. Depreciation was characterized as a decrease in value.¹⁰⁰ Clearly, it was not the intention of the Congress to grant deductions where the charity has realized no value from the transaction. Depreciation being characterized as a decrease in value, denial of such a deduction is probably proper. There does not appear to be good reason in law, however, for denial of a deduction for the fair rental value of personal property the use of which is granted to charitable organizations.

It should be noted that § 170 cases are not the only ones wherein deductions for depreciation are denied. In *Gordon v. Commissioner*¹⁰¹ it was held that depreciation of an automobile used to transport the taxpayer's infant son to a doctor did not constitute "payment," "expenses

⁹⁷ Section 167 of the Code allows a deduction for the depreciation expenses of property used in a trade or business or for the production of income. Since the property involved in *Orr* and *Mitchell* was not used in a "trade or business" or for the production of income, it appears that the theory upon which the taxpayers sought a deduction was erroneous. Furthermore, it appears, even had the property been used in a trade or business once its use had been devoted to charitable purposes, the reason for depreciation is no longer present, *i.e.*, used in a trade or business unless such charitable user is regarded as a permissible extension of trade or business use.

⁹⁸ *Orr v. United States*, 343 F.2d 553, 556 (5th Cir. 1965).

⁹⁹ *Id.* at 555.

¹⁰⁰ 42 T.C. 953, 973 (1964).

¹⁰¹ 37 T.C. 986 (1962).

paid," or "amounts paid" in order to be deductible as medical expenses under § 213.¹⁰² This case contrasts with *Sanford H. Weinzimer*,¹⁰³ wherein it was held, *inter alia*, that depreciation of an automobile used by the taxpayer in physical therapy and for income production was deductible, with the Commissioner merely arguing as to the amount of the deduction.

There is clearly an analogy between gifts of the use of real property and gifts of the use of personal property. In both cases the taxpayer-donor has given a valuable right of user to the charity, and the intent of Congress appears, in both cases, to warrant an allowance of a deduction for such a gift. The *Orr* and *Mitchell* cases seem to have reached correct results on their facts; it seems it was not the intent of Congress to allow deductions for such intangibles as depreciation. Had the taxpayers in those cases sought deductions for the rental value of the vehicles, it is reasonable to assume that the courts would have approved such deductions.

The district court in *Passailaigue* stated that "It is our view that in the Sullivan case the Tax Court clearly overruled the Commissioner's ruling in (I.T.) 3918" ¹⁰⁴ *Passailaigue* creates the prospect of an interesting new dimension in the area of gifts of the use of personal property. Where a written lease is executed between the donor and the charitable donee and the donee is granted a "property" right in the use of the chattel such as an automobile, airplane, boat, trailer, etc. the doctrine announced in *Passailaigue* may well serve as a springboard into a greater era of charitable giving.

PANDORA'S BOX—THE GIFT OF PERSONAL SERVICES

Where a taxpayer donates his time and energy for charitable causes, such efforts have a real value to the recipient, which can be measured in dollars and cents. The Service has long held, however, that the value of such services does not constitute a gift of money or property, and hence, the taxpayer is entitled to no deduction.¹⁰⁵ This policy was first

¹⁰² Section 213, INT. REV. CODE of 1954 provides that there shall be allowed as a deduction the amount by which the amount of the expenses *paid* during the taxable year for medical care of the taxpayer, his spouse, or dependents exceeds 3 percent of the adjusted gross income.

¹⁰³ 17 CCH TAX CT. REP. 712 (1958).

¹⁰⁴ 224 F. Supp. 682, 687 (M.D. Ga. 1963).

¹⁰⁵ Treas. Reg. § 1.170-2(a)(2) (1968): "No deduction is allowable for contributions of services. However, unreimbursed expenditures made incident to the rendition of services to an organization contributions to which are deductible may constitute a deductible contribution."

announced in O.D. 712 (1920),¹⁰⁶ which stated that contributions for purposes of tax deductions mean gifts of property or money, and not of services.

This position raises a number of interesting questions which should be considered in an evaluation of § 170. One such question arose in the case of *Hilla Rebay*¹⁰⁷ where the taxpayer contributed certain paintings of her own creation to qualified charities. The litigation was over the amount of the deduction to which the donor was entitled. It apparently was not disputed that the donor was entitled to some deduction for the gift made. Clearly, however, the gift consisted primarily of the donor's services. The value of the canvas consisted of the personal efforts of the donor in creating the object of the gift.¹⁰⁸

An interesting question would arise if a popular recording artist donated to a charity all of his right, title, and interest in a recording which he had made. Such a gift, of course, would be of value to the charity, and no doubt give rise to substantial income. Under the Service prohibition, however, it would appear that no deduction would be allowed to the artist, who has, in essence, contributed a service to the charity. Under the rationale of *Rebay*, however, it appears that the Service would be overruled if it disallowed a deduction for the gift.

Another question arises where one considers the value of services other than those which can be reduced to the record or canvas or the film. What of, for example, the gift by an attorney of his time in preparing legal papers for a charitable organization. The charity receives value; but for this contribution of time, skill and knowledge it would have to pay. It appears that such a gift is within the intent of Congress, which, through § 170, is seeking to encourage charities and charitable giving. The Service, however, would deny the attorney a deduction for the value of his time. Mertens states that "[e]ven if a deduction is permitted for the value of legal services rendered to a charity, the taxpayer has the burden of showing that he performed the services in the taxable year."¹⁰⁹

In rulings related to the prohibition of deductions for gifts of personal services, the Service has said that where the taxpayer donates his blood to the American Red Cross for a transfusion, he is rendering a service, and therefore not entitled to a deduction.¹¹⁰ The blood is "property," and the transfer of it can surely be construed as a "payment."

¹⁰⁶ 3 CUM BULL. 188 (1920).

¹⁰⁷ 22 CCH TAX CT. REP. 181 (1963).

¹⁰⁸ *Accord*, *Kuderna v. Commissioner*, 24 CCH TAX CT. REP. 749 (1965).

¹⁰⁹ 5 MERTENS, LAW OF FEDERAL INCOME TAXATION § 31.05, n.54 (1963).

¹¹⁰ REV. RUL. 162, 1953-2 CUM. BULL. 127.

Nevertheless, the Service has denied a deduction. When a man or woman donates blood, the charity receiving it is materially benefitted, and a deduction for the value of that received would appear to be within the spirit of § 170. A related question which has arisen involves donations by newspapers of space for advertising by charitable organizations. Service policy is to deny deductions for such contributions¹¹¹ although the charity in fact receives material and measurable benefit from the gift.

CONCLUSION

For well over fifty years the Service has attempted to deny deductions in cases where the taxpayer gives the charity the temporary use of his property. The Service argues that the "gift" is only the granting of a privilege, for which no deduction is allowed. In support of this argument, it has been said that the taxpayer-donor does not give title to the property, and because title does not pass, a deduction should not be permitted. There is no "payment."

The Courts have held that "property" consists of something less than the tangible. "Property" can and does consist of rights in the tangible—rights to buy, sell, use, occupy, and enjoy that which is tangible. The Tax Court and federal district court recognize that when a taxpayer makes a gift of a portion of his "property" he is entitled to a deduction for the value of that gift.

It may develop that the Congress will change § 170 to conform to the Service position. This it has not chosen to do. It may be argued that because Congress has never explicitly overruled I.T. 3918, it must agree with that view. However, Congress has taken no steps to overrule the Tax Court or district court in the cases which overrule I.T. 3918.

It has been continued congressional policy to use the revenue laws to encourage charitable giving. This policy, when read into the language of the Code, indicates that gifts of the use of property to qualifying organizations should give rise to charitable deductions.

It would seem that while I.T. 3918 has been judicially shot down it continues to have substantial vitality, because it continues to represent the position of the Service.

The Service does an excellent job of administering the Code. However, where the courts have interpreted the Code in a manner which is inconsistent with the Service position, it should be the first to inform taxpayers of the change. The complexities of tax law and the heavy incidence of taxation dictate that the Service fully inform taxpayers in every respect in order that they might file their returns knowledgeably.

¹¹¹ REV. RUL. 57-462, 1957-2 CUM. BULL. 157.

A COMPARISON OF OIL AND GAS LEASING AUTHORITIES IN THE GULF OF MEXICO (STATES OF ALABAMA, MISSISSIPPI, AND LOUISIANA, AND THE FEDERAL GOVERNMENT), AND THE JURISDICTIONAL CONFLICT OVER THE BOUNDARY BETWEEN STATE AND FEDERAL AUTHORITY IN THE GULF OF MEXICO

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It is the purpose of this paper to discuss oil and gas leasing in the Gulf of Mexico by agencies of the States of Alabama, Mississippi, and Louisiana, and of the United States Government. Such a discussion necessarily includes an examination of the tidelands legislation as it now exists, i.e., the Submerged Lands Act and the Outer Continental Shelf Lands Act, since these Acts form the basis of federal-state jurisdiction in the Gulf. The second portion of the article will compare the composition, functions and powers of the public leasing authorities in these three states and of the federal government. The concluding section will discuss the state-federal boundary question, which is the main jurisdictional problem connected with oil and gas leasing in this area, with particular emphasis on the present status of the litigation between the littoral states and the federal government. It is beyond the scope of this paper to discuss the jurisdiction of other federal agencies over the surface waters of the Gulf of Mexico, and these will be mentioned only briefly.

I. LEGISLATIVE BASIS OF JURISDICTION

On May 22, 1953, Congress passed the Submerged Lands Act¹ which divided title to offshore submerged lands between the coastal states and the federal government. It was implemented a few months later by passage of the Outer Continental Shelf Lands Act of August 7, 1953,² which established federal administration of the submerged

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¹ 67 Stat. 29 (1953), 43 U.S.C. §§ 1301-15 (1964). See generally, Wright, *Jurisdiction in the Tidelands*, in OIL AND GAS OPERATIONS: LEGAL CONSIDERATIONS IN THE TIDELANDS AND ON LAND, 20 (R. Slovenko ed. 1963); 1 Shalowitz, *Shore and Sea Boundaries*, U. S. DEP'T. OF COMMERCE AND COAST AND GEODETIC SURVEY PUBLICATION 10-1, 115 (1962-64).

² 67 Stat. 462-470 (1953), 43 U.S.C. §§ 1331-1343 (1964).

lands of the continental shelf (seaward of the state boundaries) retained by the United States, with emphasis on mineral leasing and development.

The purpose of the Submerged Lands Act was to return to the coastal states a portion of the seabed underlying the marginal sea and title to which the Supreme Court had in several previous decisions³ ruled as vesting in the United States. Section 3(a)⁴ of the Act, the granting clause, provides that "(1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State laws . . . are . . . recognized, confirmed, established, and vested in and assigned to the respective States" Under paragraph (b) of this section the United States releases and relinquishes unto the states all right, title and interest of the United States in all of said lands and natural resources thereof. It is further provided, in paragraph (c), that all state leases in effect on June 5, 1950, are validated and continue in force for their full term.

Section 4⁵ of the Act provides that the seaward boundary of each original coastal state is confirmed "as a line three geographical miles distant from its coast line," and any state admitted subsequent to the formation of the Union may similarly extend its seaward boundary. The last sentence of this section is in the nature of a saving clause, and provides as follows:

³ See *United States v. California*, 332 U.S. 19 (1947); *United States v. Louisiana*, 339 U.S. 699 (1950); and *United States v. Texas*, 339 U.S. 707 (1950), in which the Court enunciated the doctrine of federal, rather than state, paramount rights in the submerged lands offshore. Thus, prior to the adoption of the Submerged Lands Act in 1953, there was no authorization for oil and gas leasing in the submerged waters of the United States continental shelf, outside of inland waters. The Submerged Lands Act of 1953, together with the Outer Continental Shelf Lands Act of 1953, provided such authorization to both state and federal governments. President Truman's Proclamation on the Continental Shelf issued in 1945 did not provide for leasing of the subsoil and seabed of the continental shelf, since only Congress had the power to do this. Although the Mineral Leasing Act of 1920 (30 U.S.C. §§ 181, *et seq.* (supp. 1968)) authorizes the Secretary of Interior to lease lands owned by the United States for development and production of oil, gas and certain other minerals, it was held that offshore submerged lands are not covered by this law. *Justheim v. McKay*, 229 F.2d 29 (D.C. Cir. 1956), *cert. denied*, 351 U.S. 933 (1956).

⁴ 67 Stat. 30 (1953), 43 U.S.C. § 1311 (a) (1964).

⁵ 67 Stat. 31 (1953), 43 U.S.C. § 1312 (1964).

Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any state's seaward boundary beyond three geographical miles *if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress.* (emphasis added).

Both §§ 3(a) and 4 must be construed in the light of § 2 (a), (b), and (c)⁶ which define, respectively, "lands beneath navigable waters," "boundaries," and "coast line."

Section 2(a)⁷ includes three types of lands in its definition of "lands beneath navigable waters": *first*, lands beneath non-tidal waters, up to the ordinary high water marks as "heretofore or hereafter modified by accretion, erosion, and reliction"; *second*, "lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles"; and *third*, "all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined."

There has been no serious question regarding the first classification described above since any doubt concerning the title to that character of navigable water beds was resolved in the landmark case of *Pollard's Lessee v. Hagan*,⁸ which established the rule that the states own the beds of all navigable waters which lie within their boundaries.

The primary concern of Congress at this time was with the second classification of lands, i.e., the so-called "tidelands," or lands beneath tidal waters seaward from the coast. Under this section "lands beneath navigable waters" include such "tidelands" out to a distance of three geographical miles from the coast or further if the boundary of a state extended beyond three geographical miles at the time it became a member of the Union, or as heretofore approved by Congress. This grant was limited in § 2(b),⁹ which defined the term "boundaries" as follows:

The term "boundaries" includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico or any of the

⁶ 67 Stat. 29 (1953), 43 U.S.C. § 1301 (a)-(c) (1964).

⁷ 67 Stat. 29 (1953), 43 U.S.C. § 1301 (a) (1964).

⁸ 44 U.S. (3 How.) 212 (1845).

⁹ 67 Stat. 29 (1953), 43 U.S.C. § 1301 (b) (1964).

Great Lakes as they existed at the time such State became a member of the Union, or as heretofore approved by the Congress, or as extended or confirmed pursuant to section 4 hereof but in no event shall the term "boundaries" or the term "lands beneath navigable waters" be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, *or more than three marine leagues*¹⁰ *into the Gulf of Mexico.* (emphasis added).

This section places a definite limitation on distance from the coast line to which the Act will apply, namely, three marine leagues (nine nautical or geographical miles) for states bordering the Gulf of Mexico.

Thus the effect of the Act was to confirm in the states bordering the Gulf of Mexico ownership of submerged lands to a distance of three geographical miles from the coast line of each such state, with the privilege of proving that its boundary line as it existed at the time it became a member of the Union, or as heretofore approved by Congress, extended further into the Gulf; but, in any event, the grant was limited to three marine leagues (nine nautical or geographical miles) into the Gulf of Mexico. However, the Act does not *ipso facto* grant a state submerged land rights of three marine leagues in the Gulf; this is merely the maximum grant in this area. As to the method of perfecting claims for extended seaward boundaries, the Act does not provide. It was stated by Senator Cordon during the Senate discussion of the Act: "It [determination of boundaries] is a matter for the courts to determine, or for the United States, through Congress and the legislative organizations of the several States, to reach an agreement upon. The pending bill does not seek to invade either province."¹¹

The Act does not specify exactly how the three miles of marginal sea is to be measured. It does indicate (in §§ 2(a)(2), 2(b), and 4) that the seaward boundary of the state is to be measured from the coast line of each state. Section 2(c)¹² defines "coast line" as a composite of "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." Unfortunately, the term "inland waters" is not defined in the final version of the Act, although, as first written, the Senate Resolution¹³ defined "inland waters" to include

All estuaries, ports, harbors, bays, channels, straits, historic bays, and sounds, and all other bodies of water which join the open sea.

¹⁰ A marine league equals 3 nautical, or geographical miles.

¹¹ 99 CONG. REC. 2620 (1953).

¹² 67 Stat. 29 (1953), 43 U.S.C. § 1301 (c) (1964).

¹³ S. REP. No. 133, 83rd Cong., 1st Sess. 14 (1953).

This language, however, was deleted in committee because of the belief that "the question of what constitutes inland waters should be left where Congress finds it."¹⁴ It was therefore left to the courts to interpret the meaning of this ambiguous but crucial phrase, and this omission has given rise to federal-state offshore boundary disputes, many of which remain unsettled.

Under the Submerged Lands Act the United States retains all its rights to regulate and control the lands and navigable waters granted to the states for the constitutional purposes of commerce, navigation, national defense, and international affairs.¹⁵ Also, the United States, in time of war or for national defense purposes, reserves the prior right to purchase all or a portion of the natural resources of such lands, or to acquire and use said lands by paying just compensation to the states.¹⁶

Section 9¹⁷ of the Act reserves to the United States the natural resources of that portion of the subsoil and seabed of the Continental Shelf lying seaward and outside of the area of lands granted to the states and confirms to the United States jurisdiction and control over such resources.

The Outer Continental Shelf Lands Act¹⁸ affirmed the reservation in the Submerged Lands Act by declaring that the subsoil and seabed of the outer Continental Shelf belong to the United States and are subject to the jurisdiction, control, and power of disposition of the federal government. The term "outer Continental Shelf"¹⁹ means all

¹⁴ S. REP. No. 133, 83rd Cong., 1st Sess. 18 (1953).

The report of the Senate Committee on Interior and Insular Affairs on the Submerged Lands Act gave this explanation for its deletion:

"The words 'which include all estuaries, ports, harbors, bays, channels, straits, historic bays, and sounds and all other bodies of water which join the open sea' have been deleted from the reported bill because of the committee's belief that the question of what constitutes inland waters should be left where Congress finds it. The committee is convinced that the definition neither adds nor takes away anything a State may have now in the way of a coast and the lands underneath waters behind it," S. Rep. No. 133, 83d Cong., 1st Sess. 18 (1953).

¹⁵ 67 Stat. 32 (1953), 43 U.S.C. § 1314(a) (1964).

¹⁶ 67 Stat. 32 (1953), 43 U.S.C. § 1314 (b) (1964).

¹⁷ 67 Stat. 32 (1953), 43 U.S.C. § 1302 (1964).

¹⁸ 67 Stat. 462 (1953), 43 U.S.C. § 1332 (a) (1964). For an excellent discussion of the Outer Continental Shelf Lands Act of 1953 and the jurisdiction of the Secretary of Interior to administer the leasing provisions thereunder, see O. Stone, "Legal Aspects of Offshore Oil and Gas Operations," 8 Natural Resources J. 478 (1968).

¹⁹ 67 Stat. 462 (1953), 43 U.S.C. § 1331(a) (1964).

submerged lands lying seaward and outside of the area of lands beneath navigable waters quitclaimed to the coastal states under the Submerged Lands Act.

The Act provides ²⁰ that the Secretary of the Interior shall control oil and gas leasing of the seabed of the outer Continental Shelf. Provision is also made for the validation and maintenance of prior leases granted by the states covering submerged lands of the outer Continental Shelf.²¹

In the event of a controversy between the United States and a state as to whether or not lands are subject to the provisions of the Act, the Secretary of the Interior is authorized, with the concurrence of the Attorney General of the United States, to negotiate and enter into agreements with the state regarding operations under existing mineral leases and payment and impounding of rents, royalties, and other sums payable thereunder, or regarding the issuance or non-issuance of new mineral leases pending the settlement or adjudication of the controversy.²²

II. STATE LEASING AUTHORITIES (ALABAMA, MISSISSIPPI, LOUISIANA)

A. Title of Agency and Composition

In Alabama the Director of Conservation, on behalf of the state, is authorized to lease, for the exploration, development and production of oil and gas, any submerged lands in the Gulf of Mexico within the historic seaward boundary of the state, which is declared to extend seaward six leagues from the land bordering the Gulf. Such lands are supervised and managed by the Department of Conservation.²³

In Mississippi, the leasing of state-owned submerged land in the Gulf is under the control of the State Mineral Lease Commission, which is composed of the Governor, Attorney General, State Land Commissioner, Treasurer, and the State Oil and Gas Supervisor. The Governor is chairman and the Attorney General is secretary of the Commission.²⁴ All leases and contracts dealing with oil and gas exploration and development must be approved by the Governor and at least two other members of the Commission. The Governor and any two other members shall constitute a quorum, and all contracts, proposals, leases, etc.,

²⁰ 67 Stat. 464 (1953), 43 U.S.C. §§ 1334-1343 (1964).

²¹ 67 Stat. 465 (1953), 43 U.S.C. § 1335 (1964).

²² 67 Stat. 467 (1953), 43 U.S.C. § 1336 (1964).

²³ ALA. CODE tit. 26 §§ 179(56-i) and 179(56-l) (1958).

²⁴ MISS. CODE ANN. § 5947 (1956).

shall be acted upon by resolution duly spread upon the minutes, showing the vote of each member present. The minutes must be signed by the Governor as Chairman and the Attorney General as Secretary.²⁵

The state leasing agency in Louisiana is designated by statute as the State Mineral Board, composed of the Governor and seventeen members appointed by him. Nine members constitute a quorum. The Governor is *ex officio* chairman, and his vote determines the issue in case of a tie.²⁶

B. Meetings

The Mississippi Mineral Lease Commission does not have any regular meetings prescribed by law and the usual procedure to initiate a meeting is to contact one of the members of the Commission. The Governor, as Chairman, is the one who will call the meeting and, of course, the logical one to contact. His is also the only necessary vote on the Commission.

The Louisiana State Mineral Board also is not required to hold regular meetings but meets at the call of the Governor²⁷ and, although by statute its domicile is at the state capitol,²⁸ it may meet at any place within the State of Louisiana.²⁹ But it is expressly required by statute to open all bids for mineral leases at any state-owned buildings in the city in which the capitol is located.³⁰

C. Regulations

The Louisiana State Mineral Board has issued detailed rules and regulations for the leasing of oil, gas and minerals on state-owned tracts. The Director of Conservation of Alabama has issued rules and regulations regulating and controlling geophysical, seismic or other exploration for oil and gas on state-owned water bottoms. The purpose of the Alabama geophysical regulations is "to prevent the destruction of, or injury to, the oysters, shrimp, fish and other aquatic life or other natural resources of the State of Alabama" by the discharge of explosives or otherwise. The Mississippi Commission has not yet issued any rules and regulations concerning leasing in offshore areas.

D. Powers and Functions

The authority of the Mississippi Mineral Lease Commission to

²⁵ MISS. CODE ANN. § 5952 (1956).

²⁶ LA. REV. STAT. § 30:121 (Supp. 1968).

²⁷ LA. REV. STAT. § 30:123 (1950).

²⁸ LA. REV. STAT. § 30:121 (Supp. 1968).

²⁹ LA. REV. STAT. § 30:123 (1950).

³⁰ LA. REV. STAT. § 30:127 (Supp. 1968).

lease public lands for oil and gas is expressed in very general terms. It is empowered, for and on behalf of the state, to lease any and all of the land owned by the state, including submerged lands, "or wherever the tide may ebb and flow . . . to some reputable person, association or company, for oil and/or gas . . . for such consideration and upon such terms and conditions as said commission shall deem just and proper."³¹

In its 1968 Session the Mississippi Legislature extended the powers of the Mineral Lease Commission by amending § 5948 of the Mississippi Code of 1942, Recompiled. This Act³² authorized the State Mineral Lease Commission to employ competent engineering personnel to survey the territorial waters of the State in the Mississippi Sound and the Gulf of Mexico and to prepare a map or plat of such territorial waters divided into blocks of not more than 6,000 acres each. The Mineral Lease Commission is authorized to adopt such survey, plat or map for leasing of such submerged lands for mineral development. Such a map is in the process of being prepared and copies will be on file with the Mineral Lease Commission and in the office of the State Oil and Gas Board. It is also understood that regulations will be issued concerning leasing procedures.

The authority of the Director of Conservation of Alabama is also couched in general terms. He is merely directed to lease submerged lands in the Gulf of Mexico "upon such terms as he may approve."³³

The Louisiana State Mineral Board is a body corporate, with its domicile at the state capitol, possessing, in addition to the powers expressly conferred on it by statute, all the powers, duties, and responsibilities incident to a corporation, including the power to sue and be sued.³⁴ The courts have recognized, however, that despite its corporate entity, it is nevertheless an agency or arm of the State of Louisiana, for the purpose of granting and supervising mineral leases, and that the state has not transferred to the Board title to its lands and mineral rights.³⁵ Thus, an action does not lie against the State Mineral Board which has as its sole purpose the determination of title and in which the cancellation of a mineral lease plays no part.³⁶ However, the

³¹ MISS. CODE ANN. § 5948 (Supp. 1968).

³² MISS. CODE ANN. § 5949 (Supp. 1968).

³³ ALA. CODE tit. 26 § 179 (56-1) (1958).

³⁴ LA. REV. STAT. § 30:121 (Supp. 1968).

³⁵ *Daigle v. Pan American Prod. Co.*, 236 La. 578, 108 So.2d 516 (1958).

³⁶ Madden, *Leasing of Public Lands in Louisiana for Oil, Gas and Mineral Development*, in 7 TULANE TIDELANDS INST., MINERALS AND TIDELANDS LAW, 69 (R. Slovenko ed. 1963).

Mineral Board has been held to be a proper defendant in an action involving its authority to lease and the right of lessees under such leases.³⁷

Lands under the jurisdiction of the Board and capable of being leased by it are defined as "any lands belonging to the state, or the title to which is in the public, including road beds, water bottoms, and land adjudicated to the state at tax sales."³⁸ The courts have interpreted the phrase "the title to which is in the public" as referring to property owned or acquired by the state for its use and benefit and not to property owned by or used for the benefit of any subdivision of the state.³⁹

Unlike Alabama and Mississippi, Louisiana has lengthy statutory provisions setting out the powers and duties of the State Mineral Board. These have been developed and refined over the years from the first state leasing law in 1915⁴⁰ and are found now as sub-part A of Part II of Title 30 on Minerals, Oil and Gas, in the Louisiana Revised Statutes. Among the powers expressly conferred on the Board by statute⁴¹ are the supervision of all leases granted by the state, in order that it may determine that the terms of these leases are fully complied with, and it has general authority to take any action necessary to protect the interests of the state. It may institute actions to annul a lease upon any legal ground. It may enter into agreements to amend a lease but, with one exception, it may not extend the primary term of a lease. The exception is with respect to leases granted prior to the effective date of Act 46 of 1950 and affecting offshore lands, in which case it is permitted to extend the primary term for a period not to exceed two years. The Board may not, except in pooling or unitization agreements, amend a lease by reducing the amount of the bonus, rental, royalty or other consideration stipulated in the lease. The Board may join in pooling and unitization agreements covering a lease,⁴² but its authority to enter into unitization agreements is limited to acreage already covered by state leases.⁴³

³⁷ *Walmsley v. Pan American Pet. Corp.*, 144 So.2d 627, (La. App. 1962), *cause remanded*, 244 La. 513, 153 So.2d 375 (1963).

³⁸ LA. REV. STAT. § 30:124 (1950).

³⁹ *Placid Oil Co. v. Hebert*, 194 La. 788, 194 So. 893 (1940).

⁴⁰ No. 21 [1915] La. Acts Ex. Sess. See Brumfield, *State and Federal Laws and Regulations on Offshore Leasing, Drilling and Production*, in OIL AND GAS OPERATIONS: LEGAL CONSIDERATIONS IN THE TIDELANDS AND ON LAND 226-38 (R. Slovenko ed. 1963).

⁴¹ LA. REV. STAT. § 30:129 (1950).

⁴² *Id.*

⁴³ OP. LA. ATT'Y GEN., June 24, 1943 and April 22, 1952.

No transfer or assignment in relation to any lease is valid unless approved by the Board.⁴⁴ The Leasing Act is not explicit concerning the type of transactions covered but counsel for the Board has extended it to cover any kind of transaction, including mortgages, deeds of trust, and mergers. It is considered important that at all times the State Mineral Board should know who owns the leasehold rights.⁴⁵

Unlike either Alabama or Mississippi, Louisiana has enacted two statutes conferring special powers upon the State Mineral Board. The first statute⁴⁶ confers special authority upon the State Mineral Board, in the event of a controversy between any person, including any domestic or foreign corporation, any association or partnership, the United States and any adjoining state and any state agency or political subdivision, and the State of Louisiana, as to the ownership of any premises, not involved in the tidelands litigations, to negotiate and enter into agreements on behalf of the State respecting the ownership and boundaries of such lands or respecting operations under any mineral lease covering such premises pending settlement or adjudication of the controversy; and also is authorized to enter into agreements respecting the issuance of new leases.

The second statute⁴⁷ relates to the present controversy between the United States and the State of Louisiana as to whether certain portions of submerged lands on the Gulf are owned and controlled by the State of Louisiana under the provisions of the Submerged Lands Act, or whether such lands are owned and controlled by the United States under the provisions of the Outer Continental Shelf Lands Act. The State Mineral Board is authorized, with the concurrence and approval of the Governor, to negotiate and enter into agreements for and on behalf of the State of Louisiana, with any lessee or future lessee of the State, to negotiate and enter into tentative agreements or stipulations with the United States, or any present or future grantee or lessee of the United States, respecting the ownership and boundaries of such lands and operations under any mineral lease on such lands, and the deposit in escrow or impounding of sums payable under such leases, pending the settlement or adjudication of the controversy. It was under a similar statute (since repealed)⁴⁸ that on October 12, 1956, an interim agreement was entered into between the State of Louisiana and the

⁴⁴ LA. REV. STAT. § 30:128 (1950).

⁴⁵ Moses, *The Mineral Leasing of State and State Agency Lands in Louisiana*, 10 INST. ON MINERAL LAW 42, 53 (1963).

⁴⁶ LA. REV. STAT. § 30:178 (*As amended*, Acts 1962, No. 259, § 1).

⁴⁷ LA. REV. STAT. § 30:179.11 (Supp. 1968).

⁴⁸ LA. REV. STAT. §§ 30:174-176 (Repealed Acts 1962, No. 9). Subject matter now covered by LA. REV. STAT. §§ 30:179.11-12 (Supp. 1968).

United States, which, with full protection for the State of Louisiana, permitted the resumption of operations in the disputed offshore area, which Louisiana had succeeded in enjoining, and under which more than two hundred separate agreements were entered into with lessees of the United States. As to any area with respect to which the claims of Louisiana are established, the leases will be validated, subject to full payment of all sums due thereunder, including all applicable taxes not previously paid to the State of Louisiana.⁴⁹ The Louisiana Legislature must ratify any final agreement or stipulation with the United States as to the ownership and boundaries of offshore lands before it is binding on the State.⁵⁰

The agencies of both Mississippi and Alabama are limited to their authority "to lease" state-owned land and have been given no power to enter into agreements with anyone as to the title to lands claimed by the state. Where only a lease is concerned, apparently these agencies have broad authority to decide the terms and conditions of the lease.⁵¹

E. Terms of Lease

The Mississippi Mineral Lease Commission is given wide discretion in setting the terms and conditions of the lease, the statute⁵² merely specifying that the commission shall lease "for such consideration and upon such terms and conditions as said commission shall deem just and proper." Its only restriction is that the working interest shall not be for more than $\frac{7}{8}$ and the royalty to the state shall be at least $\frac{1}{8}$. Primary term, delay rentals and bonus are all left to the discretion of the commission. No restriction is placed on acreage that may be leased.

The Alabama statute⁵³ is also silent on the specific terms of the lease, the Director of Conservation being authorized to lease "upon such terms as he may approve." Another section⁵⁴ does provide that "no tract of land containing more than five thousand two hundred (5,200) acres shall be leased or advertised for lease . . ." It has been held by the Supreme Court of Alabama, however, that the State Director of Conservation, in appraising the respective values of royalty proposals contained in bids for oil and gas leases, is authorized to use his best judgment; and that the consideration for a sale of oil and gas leases on state lands to the

⁴⁹ See Wright, *Functions and Procedures of the State Mineral Board*, 8 INST. ON MINERAL LAW 108 (1961).

⁵⁰ LA. REV. STAT. § 30:179.12 (Supp. 1968).

⁵¹ MISS. CODE ANN. § 5948 (1956); ALA. CODE tit. 26, § 179 (56-1) (1958).

⁵² MISS. CODE ANN. § 5948 (1956).

⁵³ ALA. CODE tit. 26, § 179 (56-1) (1958).

⁵⁴ ALA. CODE tit. 26, § 179 (56-n) (1958).

highest bidder is threefold: (1) the so-called bonus, which is the amount of cash presently paid; (2) the so-called annual rental; and (3) the royalty, each of which forms an integral part of the consideration or price of the rights sold.⁵⁵

The lease form currently in use in Alabama is Alabama Dept. of Conservation Lease Form, Feb. 14, 1952. It is a typical "unless" type lease, which means that it provides for a fixed primary term (usually short) after which the lease shall continue in force "as long thereafter as oil, or gas is produced in paying quantities"; and if drilling operations are not commenced on the leased premises on or before one year from the date of the lease, it shall terminate unless the lessee on or before the expiration of said period shall pay or tender to the lessor a specified sum as "rental," which is for the privilege of delaying the commencement of drilling for another twelve months, and so on during the primary term. According to advice received from the Department of Conservation, as of November 10, 1967, "some several hundred thousand acres in various leases are presently in effect in Alabama tidelands areas."⁵⁶

The Louisiana statutes fix certain minimum requirements which limit the State Mineral Board in accepting bids. For example, the maximum area that may be included in a single lease is 5,000 acres.⁵⁷ The statute⁵⁸ fixes the minimum royalty at $\frac{1}{8}$ on oil and gas, but the policy of the Board is not to consider a $\frac{1}{8}$ royalty bid on oil and gas except on rank wildcat areas and in extraordinary circumstances.⁵⁹ The statutes do not require that a cash bonus be included in a bid or a lease. Louisiana Revised Statute 30:127 requires only that if a bonus is stipulated, the annual rental must not be for less than one-half the amount of the bonus. But Mr. John L. Madden, in his article on "Leasing of Public Lands in Louisiana for Oil, Gas and Mineral Development,"⁶⁰ comments that "it is invariably the practice of the State Mineral Board to require a bonus in addition to minimum royalties in advertising for the reception of bids." He states further:

⁵⁵ *Huddleston v. Humble Oil & Ref. Co.*, 260 Ala. 384, 71 So.2d 39 (1954).

⁵⁶ Letter dated November 10, 1967, to the author from William G. O'Rear, Chief Attorney, State of Alabama Department of Conversation.

⁵⁷ LA. REV. STAT. § 30:127 (1950).

⁵⁸ *Id.*

⁵⁹ Moses, *The Mineral Leasing of State and State Agency Lands in Louisiana*, in 10 INST. ON MINERAL LAW 51 (1963).

⁶⁰ Madden, *Leasing of Public Lands in Louisiana for Oil, Gas and Mineral Development*, in *Minerals and Tidelands Law*, 7th ANNUAL TULANE TIDELANDS INSTITUTE, 47, 53 (R. Slovenko ed. 1963).

Annual or delay rentals, once stipulated in a duly executed state or state agency mineral lease, may not be reduced, even though a portion or portions of the leased premises be surrendered. The rentals must therefore remain fixed as stipulated, on the basis mentioned, throughout the primary term of the lease or until oil, gas or other minerals are discovered and produced in paying quantities.

The statutes do not fix a primary period for the lease. Nevertheless, the policy of the Board has been to grant leases for a term of five years on offshore leases.⁶¹

The Board has its special type of lease form, Louisiana State Lease Form Revised, 1966. As in the case of the Alabama lease form described above, the Louisiana lease is of the "unless" type commonly in use today, but it differs materially from the commercial form of lease on which the Alabama lease form is patterned, since it follows closely the statutory provisions and policies of the State Mineral Board.

F. Bidding Procedure

There is no bidding procedure mentioned in the Mississippi statutes concerning leasing of public lands by the Mineral Lease Commission. The Alabama⁶² and Louisiana⁶³ statutes are generally similar, with more detailed instructions to be found in the Louisiana statutes. Both provide for leases to be granted upon the basis of competitive bids, publicly opened at designated places. Alabama limits the acreage in each lease to 5,200 acres, whereas, Louisiana allows only 5,000 acres. Both state agencies must publish advertisements of the bids in state and local newspapers for a specified number of days before the final date for opening bids, i.e., fifteen days in Louisiana and twenty-five days in Alabama. The Louisiana statute⁶⁴ also provides that bids may be for the whole or any particularly described portion of the land advertised.

In Alabama "the lease of any tract of land shall be awarded to the highest responsible bidder making the most advantageous offer to the state and the Director of Conservation must either accept the most advantageous offer or reject all bids within five (5) days from the date said bids were opened." The Louisiana State Mineral Board has the authority⁶⁵ to accept the bid most advantageous to the state subject to the statutory minimum requirements. The Board may also reject any

⁶¹ Moses, *supra* note 59.

⁶² ALA. CODE tit. 26, § 179 (56-n) (1958).

⁶³ LA. REV. STAT. §§ 30:125-127 (1950).

⁶⁴ LA. REV. STAT. § 30:127 (1950).

⁶⁵ *Id.*

and all bids, or may lease a lesser quantity of property than advertised and withdraw the rest. If a lesser quantity of property than advertised is leased, it cannot be for less proportionately than the most favorable bonus and rental bid received for the larger tract. As pointed out by Mr. Madden in his article mentioned above,

The highest bonus offered may not necessarily be the most advantageous bid. Royalties, oil payments, drilling obligations, etc., may be and are considered in evaluating the bids, and the amount of the bonus offered is not necessarily controlling.⁶⁶

G. Pooling and Unitization

All three states permit the state leasing authority to join in pooling and unitization agreements covering a lease. In Alabama the leasing is under the direct control of the Director of Conservation, who is specially authorized⁶⁷ to execute upon such terms as he may approve (a) pooling or unitization agreements affecting oil or gas under public lands; and (b) agreements amending existing leases so as to authorize lessees to pool or unitize the leases, the lands or minerals covered thereby or parts thereof. All of these agreements must, however, be approved, in writing, by the governor. As mentioned earlier, the Director of Conservation has issued rules and regulations governing geophysical, seismic or other exploration for oil and gas on state-owned water bottoms, as a conservation measure.

Louisiana's State Mineral Board is authorized by statute⁶⁸ to join in pooling and unitization affecting a state mineral lease, so as to create, by the combination of these leases, or royalty and mineral rights, one or more operating units. Royalties may be reduced proportionately in the event of production of oil or gas from any unit so created. The Board is authorized to enter into unitization agreements only with respect to state lands that are covered by a state mineral lease.⁶⁹ Obviously, unleased lands of the state may be included in forced pooling units created by the Commissioner of Conservation.⁷⁰ Wright

⁶⁶ Madden, *supra* note 60, at 66.

⁶⁷ ALA. CODE tit. 26, § 179 (56-m) (1958).

⁶⁸ LA. REV. STAT. § 30:129 (1950).

⁶⁹ OP. LA. ATT'Y GEN., June 24, 1943 and April 22, 1952.

⁷⁰ Madden, *supra* note 60 at 68. The Legislature did not, by adoption of § 129, intend to nullify R.S. 30:9 and R.S. 30:10 dealing with powers of the Conservation Commissioner with regard to involuntary pooling and unitization, and in case of conflict, the powers of the Conservation Commissioner must be adhered to. OP. LA. ATT'Y GEN. April 13, 1955.

states⁷¹ that the functions of the State Mineral Board are sometimes confused with those of the Department of Conservation, but, although it works closely with the latter, the Board is not directly concerned with matters of conservation, which are within the jurisdiction of the Department of Conservation.

In Mississippi, the Mineral Lease Commission is "charged with the duty of conserving and protecting the natural resources in or under the public land of the state of Mississippi and exploiting and exploring same as hereinafter provided."⁷² Thus, it apparently has a two-fold duty—to lease public lands for oil and gas and also to conserve the natural resources of the state. The principal conservation agency of the state is the State Oil and Gas Board.⁷³ The Oil and Gas Board has overall "jurisdiction and authority over all persons and property necessary to administer and enforce effectively the provisions of this act and all other acts relating to the conservation of oil and gas."⁷⁴ But § 6132-51 of the Mississippi Code (within the Oil and Gas Board Section of the Code) authorizes the State Mineral Lease Commission to execute, on behalf of the state

. . . agreements covering any lease or leases now in effect or which may hereafter be granted, and the mineral and royalty interests thereunder, for establishing and carrying out the co-operative development and operation of common accumulations of oil and gas, or both, in all or any portion of a field or area which appears from geological or other data to contain such common accumulations of oil or gas, or both, including the right and power to pool, consolidate and unitize the land covered by any lease or leases, now in effect or which may hereafter be granted, in its entirety or as to any stratum or strata or any portion or portions thereof, with other lands and leases in the immediate vicinity thereof, for the purpose of joint development and operation of the entire consolidated premises as a unit. Such agreements include, but are not limited to, all types of secondary recovery methods and operations. . . .

Any such agreement has the effect of continuing a lease in existence as long as the agreement continues in force. However, while the Commission may alone execute pooling agreements, it is also provided in this section that any agreements as to field-wide unitization shall not become effective until formally approved by the State Oil and Gas

⁷¹ Wright, *supra* note 49 at 109.

⁷² MISS. CODE ANN. § 5947 (1952).

⁷³ MISS. CODE ANN. §§ 6132-01 to 6132-51 (1952).

⁷⁴ MISS. CODE ANN. § 6132-10 (1952).

Board. Thus it is noted that in Mississippi two separate state agencies share jurisdiction over conservation of oil and gas in public lands, including offshore areas in the Gulf of Mexico.

III. FEDERAL LEASING AUTHORITY

A. Federal Agency

Section 5⁷⁵ of the Outer Continental Shelf Lands Act confers broad powers upon the Secretary of the Interior to lease submerged lands belonging to the federal government in the Gulf of Mexico and to issue the necessary rules and regulations. Such regulations have been issued, being Part 3380 *et seq.* of Title 43 of the Code of Federal Regulations. The leasing itself is under the control of the Director of the Bureau of Land Management, while the day-to-day operations of the lease are under the jurisdiction of the United States Geological Survey.

B. Terms of the Lease

An oil and gas lease issued by the Secretary pursuant to § 8(b)⁷⁶ of the Act is limited to a compact area not exceeding 5,760 acres, shall be for a period of five years and as long thereafter as oil and gas may be produced from the area in paying quantities, or drilling or well reworking operations as approved by the Secretary are conducted thereon.⁷⁷ Provisions for payment of annual rental prior to discovery are left indefinite in both § 8 of the Act itself and in the Regulations.⁷⁸ The latter merely provide that an annual rental shall be paid on the first day of each lease year prior to discovery, at the rate "specified in the lease." It may be noted that Louisiana is the only one of the three states considered which specifies by statute the amount of rental required, i.e., the rental must not be less than one-half of the cash bonus.

Royalty is fixed by § 8(b) of the Act at not less than 12½% in the amount or value of the production saved, removed, or sold from the lease.⁷⁹ Either the cash bonus or the royalty will be fixed in advance by the Secretary.⁸⁰ If the royalty is fixed, the competition will be on the bonus offered; if the bonus is fixed, the competition will be on the royalty. The royalty, of course, cannot be less than 12½%, or ⅓, which is the same as the minimum royalty required by the Mississippi and Louisiana statutes and which is customary in the oil and gas industry.

⁷⁵ 67 Stat. 464 (1953), 43 U.S.C. § 1334 (1964).

⁷⁶ 67 Stat. 468 (1953), 43 U.S.C. § 1337(b) (1964).

⁷⁷ 43 C.F.R. § 3382.1.

⁷⁸ 43 C.F.R. § 3383.

⁷⁹ 43 C.F.R. § 3383.2.

⁸⁰ 67 Stat. 468 (1953), 43 U.S.C. § 1337(a) (1964).

C. Bidding Procedure

Although they vary in certain details, as specified in the Regulations, bidding procedures are generally similar to those in force in the states of Alabama and Louisiana. In accordance with the provisions of § 8(a)⁸¹ of the Act, all leases are issued competitively, upon the Department's motion or upon a request describing the area and expressing an interest in leasing a unit or units addressed to the Director of the Bureau of Land Management, Washington, D.C.⁸² The usual procedure has been for the Director of the Bureau of Land Management to announce, through news release and publication in the Federal Register, a readiness to receive nominations by interested persons who wish to acquire leases with designation of the tracts.⁸³ Since the passage of the Outer Continental Shelf Lands Act, a total of thirteen competitive oil and gas lease sales have been held, in 1954, 1955, 1959, 1960, 1962, 1963, 1964 and 1966. A total of 1037 leases comprising over 4.6 million acres have been issued, of which 751 comprising 3.1 million acres were off the coast of Louisiana.⁸⁴

Bidding is by sealed bids and leases are awarded to the highest qualified bidder on the basis specified in the notice of lease offer.⁸⁵ Notice of the offer of lands for lease and terms of bidding must be published in the Federal Register at least thirty days prior to the date of sale.⁸⁶ A separate bid must be submitted for each lease unit desired.⁸⁷ A bid may not be submitted for less than an entire unit but this does not mean that a full 5,000 acre tract must be bid on, unless that was the unit by which it was described in the Notice of Lease Offer.⁸⁸

Any and all bids may be rejected, as in the state procedure. In the event the highest bids are tie bids, the bidders may file with the Director within fifteen days after notification an agreement to accept the lease jointly, otherwise all bids will be rejected.⁸⁹

⁸¹ *Id.*

⁸² 43 C.F.R. § 3382.1.

⁸³ Brumfield, *State and Federal Laws and Regulations on Off-shore Leasing, Drilling and Production*, included in OIL AND GAS OPERATIONS: LEGAL CONSIDERATIONS IN THE TIDELANDS AND ON LAND 226, 227-28 (R. Slovenko ed. 1963).

⁸⁴ UNITED STATES DEPT OF THE INTERIOR, PETROLEUM PRODUCTION, DRILLING AND LEASING OF THE OUTER CONTINENTAL SHELF 7 (May 1966).

⁸⁵ 43 C.F.R. § 3382.1.

⁸⁶ 43 C.F.R. § 3382.3.

⁸⁷ 43 C.F.R. § 3382.4.

⁸⁸ Brumfield, *supra* note 83 at 228.

⁸⁹ 43 C.F.R. § 3382.5.

An important difference between federal and state procedure is the requirement concerning qualification of bidders. Oil and gas leases may be held only by citizens of the United States over 21 years of age, or by associations of such citizens, states, political subdivisions of a state, or private, public, or municipal corporations organized under the laws of the United States or of any State or Territory thereof.⁹⁰ An individual must submit with his bid a statement of his citizenship. If the bidder is an association (including a partnership), or a corporation, the bid must be accompanied by a certified copy of the formal documents showing evidence of authority to sign the bid. A deposit must also accompany a bid, amounting to one-fifth of the amount of the cash bonus.⁹¹

D. Cancellation of Lease

Another variation between federal and state leasing procedure is the authority given the Secretary of the Interior, under § 5(b)⁹² of the Act to cancel leases under certain conditions. Under § 5(b)(1), any nonproducing lease may be cancelled whenever the lessee fails to comply with any provision of the Act or lease or applicable regulations, if such failure to comply continues for 30 days after mailing of notice by registered letter to the lease owner. Such cancellation is subject to judicial review as provided in § 8(j)⁹³ of the Act. Producing leases issued under the Act may be cancelled for such failure only by judicial proceedings as prescribed in § (5)(b)(2) of the Act. The Secretary may cancel any lease obtained by fraud or misrepresentation.⁹⁴

E. Form of Lease

The Department of the Interior has a special form of oil and gas lease (Form 3380-1, Feb. 1966) which is different from the usual commercial oil and gas lease.

F. Pooling and Conservation

In the area of conservation there is an overlapping of authority between federal and state agencies. The Outer Continental Shelf Act vests exclusive jurisdiction in the Secretary of the Interior to prescribe rules and regulations for the conservation and prevention of waste of the natural resources of the Outer Continental Shelf; and to enter into pooling and unitization agreements.⁹⁵ In the same section, (5(a)(1)),

⁹⁰ 43 C.F.R. § 3380.1.

⁹¹ 43 C.F.R. § 3382.4.

⁹² 67 Stat. 464, 43 U.S.C. § 1334(b) (1964); 43 C.F.R. § 3386.2.

⁹³ 67 Stat. 469, 42 U.S.C. § 1337(j) (1964).

⁹⁴ 67 Stat. 469, 43 U.S.C. § 1337(i); 43 C.F.R. § 3386.2.

⁹⁵ 67 Stat. 464, 43 U.S.C. § 1334(a)(i); C.F.R. Subpart 3381.

the Secretary has also been authorized by Congress to cooperate with state conservation agencies in the exercise of his conservation authority under the Act. In the disputed area off the coast of Louisiana, the federal lessees have been required to conform to the schedules of allowable production published by the Louisiana conservation authority. This is done through orders issued the lessees by the Geological Survey's Regional Oil and Gas Supervisor in the Gulf Coast Region. As stated on page six of the pamphlet issued by the United States Department of the Interior, entitled "Petroleum Production, Drilling and Leasing on the Outer Continental Shelf" (May 1966):

The Louisiana schedules have legal effect as to Federal lessees only by virtue of their imposition by Federal authority, and enforcement of the Supervisor's orders and the imposition of penalties for violations are under the exclusive jurisdiction of the Department of the Interior. This arrangement, the result of a tacit working agreement between the Department of the Interior and the State of Louisiana, is subject to termination upon notice by either party.

G. Federal/State Relationship

In the event of a controversy between the United States and a state as to whether or not lands are subject to the provisions of the Outer Continental Shelf Lands Act, the Secretary of the Interior is authorized, with the concurrence of the Attorney General of the United States, to negotiate and enter into agreements with the state regarding operations under existing mineral leases and payment and impounding of rents, royalties, and other sums payable thereunder, or regarding the issuance or nonissuance of new mineral leases pending the settlement or adjudication of the controversy.⁹⁶ Pursuant to this authorization, the Secretary entered into the Interim Agreement of October 12, 1956 between the United States and the State of Louisiana (which has a similar statute) in order to continue leasing in the disputed tidelands area off the coast of Louisiana. This Agreement is still in effect pending settlement of the controversy regarding the location of Louisiana's coastline.

IV. FEDERAL AND STATE AGENCIES HAVING JURISDICTION OVER SURFACE WATERS OF GULF OF MEXICO

It is beyond the scope of this paper to discuss in detail exploitation in the Gulf of Mexico under an oil and gas lease issued by either state or federal authorities. However, it should be pointed out that after

⁹⁶ 67 Stat. 467 (1953), 43 U.S.C. § 1336 (1964).

obtaining a lease under either the Outer Continental Shelf Lands Act or Submerged Lands Act, other federal regulatory agencies become involved, e.g., the United States Coast Guard and the United States Army Corps of Engineers.

Section 6(a) of the Submerged Lands Act reserves to the United States:

all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 1311 of this title.⁹⁷

The United States Coast Guard has law enforcement responsibility for all waters for which the United States is responsible and for all United States vessels on the high seas. Section 4(e)(1)⁹⁸ of the Outer Continental Shelf Lands Act gives authority to the Coast Guard over lights and other warning devices, safety equipment, and other matters relating to the promotion of safety of life and property on the subsoil and seabed of the Outer Continental Shelf and on all artificial islands and fixed structures which may be erected on the subsoil of the Outer Continental Shelf.⁹⁹

Section 4(f)¹⁰⁰ of the Outer Continental Shelf Lands Act extends the authority of the Secretary of the Army to artificial islands and fixed structures located on the Outer Continental Shelf. The United States Army Corps of Engineers has jurisdiction over navigation and permits for drilling wells or erecting structures which might affect navigation.

Thus the federal government has retained control over the surface waters of the Gulf of Mexico. Both federal and state lessees must obtain permits to drill and erect structures in the Gulf from the Army Corps of Engineers, and both must comply with safety regulations of the Coast Guard.

⁹⁷ 67 Stat. 32 (1953), 43 U.S.C. § 1314(a) (1964).

⁹⁸ 67 Stat. 462 (1953), 43 U.S.C. § 1333(e)(1) (1964).

⁹⁹ See J. Kerrins, *Coast Guard Regulations in the Tidelands*, in *OIL AND GAS OPERATIONS: LEGAL CONSIDERATIONS IN THE TIDELANDS AND ON LAND* 256-67; Dentzler, *Tidelands Operations Under Coast Guard Regulations*, in *id.*, 268-75.

¹⁰⁰ 67 Stat. 462 (1953), 43 U.S.C. § 1333(f) (1964).

In its 1968 Session the Mississippi Legislature passed a law¹⁰¹ providing that duly qualified persons, firms, or corporations (who have complied with the provision of the applicable statutes) may construct, operate and maintain facilities incident to the exploration, production and transportation of oil, gas or other minerals in any of the navigable waters of the State upon obtaining from the State Oil and Gas Board a permit for a fee of \$500. The right to construct, operate and maintain such facility in, on, under or across land which is submerged or whereover the tide may ebb and flow is subject to the paramount right of the United States to control commerce and navigation and the right of the public to make free use of the waters.

V. THE CONFLICT OVER FEDERAL/STATE BOUNDARIES IN THE GULF OF MEXICO

The principal conflict between federal and state leasing authorities in the Gulf of Mexico stems from uncertainty as to the exact location of the boundary line between state and federal areas. The Submerged Lands Act, discussed in Section I of this paper, settled some questions and created others. After enactment of this legislation, each of the states bordering on the Gulf of Mexico claimed that its grant under the Act extended three leagues (nine geographical miles) into the Gulf of Mexico and the State of Louisiana went even further, claiming title to all lands out to three leagues beyond the so-called "Coast Guard" line. This was a line finally established in 1953 under regulations promulgated by the Commandant of the Coast Guard, pursuant to an 1895 law¹⁰² to define where the Inland Rules of Navigation, as distinguished from the International Rules, became applicable.

A. Interim Agreement

The federal government maintained that the grants to the states under the Act extended only three geographical miles into the Gulf. In 1956 a dispute between the State of Louisiana and the federal government which arose out of attempts by the latter to offer for leasing a number of tracts lying between the 3-mile limit and the 3-league line off the coast of Louisiana resulted in an injunction order issued by the United States Supreme Court which prohibited both parties from issuing any new leases or commencing additional drilling in the disputed tidelands "pending further order of this Court unless by agreement of the

¹⁰¹ MISS. CODE ANN. §§ 6132-61 (Supp. 1968).

¹⁰² 28 Stat. 672 (1895), 33 U.S.C. § 151 (1964).

parties filed here.”¹⁰³ This order led to execution of the 1956 Interim Agreement between the federal government and the State of Louisiana. The Louisiana Legislature adopted as an emergency measure Act 38 of 1956¹⁰⁴ which authorized the State Mineral Board, with the concurrence of the Louisiana Attorney General, to enter into agreements with the United States involving leases, operations and royalties in the disputed area. The United States, through the Secretary of the Interior and with the concurrence of the United States Attorney General, had previously been given similar authority to enter into agreements with the state under § 7 of the Outer Continental Shelf Lands Act.¹⁰⁵

Under the Interim Agreement mineral development in the disputed area could proceed pending final determination of the controversy by later agreement or judicial decree. Four zones were created, extending seaward from a baseline designated as the “Chapman Line.” This line, named for a former Secretary of the Interior, had been established earlier by the Department of Interior and its use was in no way intended to bind the parties except for purposes of the Interim Agreement. It established the federal government’s concept of the low water mark of the coast of Louisiana and followed the shoreline closely.

Zone 1 was designated as the area lying seaward of and within three geographical miles of the Chapman Line. Zone 2 comprised the area extending from the seaward boundary of Zone 1 (or the 3-mile line) to a line lying three marine leagues from the Chapman Line. Zone 3 was defined as being that area extending from the seaward boundary of Zone 2 to the seaward boundary line of the State of Louisiana as fixed and redefined by Act 33 of the Louisiana Legislature of 1954 (the so-called “Coast Guard Line”). Zone 4 comprised all of that portion of the Continental Shelf lying seaward from the seaward line of Zone 3.¹⁰⁶

Under the Agreement the State of Louisiana was given exclusive jurisdiction over Zone 1; Zones 2 and 3 were designated as the disputed areas to be administered as provided in the Agreement and Zone 4 was defined as an area of exclusive federal jurisdiction. Any lessee, either of the United States or the State of Louisiana, desiring to free a leased area from the effect of the injunction, was required to execute several agreements in favor of the United States and the State of Louisiana, which added to the complexity of leasing in the Gulf under the Interim Agreement.¹⁰⁷ As a result of the Supplemental Decree of December 13,

¹⁰³ *United States v. Louisiana*, 351 U.S. 978 (1956) (misc. order).

¹⁰⁴ LA. REV. STAT. 30:174-177 (1950). See note 48.

¹⁰⁵ 67 Stat. 467, 43 U.S.C. § 1336 (1964).

¹⁰⁶ Lewis, *The State Federal Interim Agreement Concerning offshore Leasing and Operations*, 33 TUL. L. REV. 331, 333 (1959).

¹⁰⁷ *Id.*

1965, in *United States v. Louisiana*,¹⁰⁸ Zone 1, as described in the Interim Agreement, has been augmented by certain disputed areas conceded to belong to Louisiana.

The Agreement provided for all income from existing and future leases to be impounded in an escrow fund until final resolution of the title questions. Up to May 1966, the amount of money held in escrow had reached approximately \$850 million, though the Supplemental Decree issued by the Supreme Court on December 13, 1965, will result in release of over \$200 million from the impoundment fund.¹⁰⁹

B. *United States v. Louisiana Et Al.*

In 1960, the United States Supreme Court rendered decisions holding that, under the Submerged Lands Act, the states of Louisiana, Mississippi, and Alabama were entitled to no more than three geographic miles from their coastlines, and that Texas and Florida were entitled to the submerged lands extending three marine leagues into the Gulf.¹¹⁰ However, the Court did not rule on the question of the exact location of the coastlines of these states, i.e., the baseline from which the three miles or three leagues was to be measured, but expressly reserved jurisdiction to make these determinations at some future date.

The Court states (at 24): "[W]e find a clear understanding by Congress that the question of rights beyond three miles turned on the existence of an expressly defined state boundary beyond three miles." Concerning the contention of the states on this point, the Court commented (at 25):

Louisiana asserted that the Act of Congress admitting it to the Union in 1812 fixed for it a three-league maritime boundary by virtue of the provision which includes within the State "all islands within three leagues of the coast." And it was suggested that Mississippi and Alabama might claim boundaries six leagues in the Gulf because of similar provisions in the Acts admitting them to the Union.

It was recognized that if the legal existence of such boundaries could be established, they would clearly entitle the respective States to submerged land rights to that distance under an application of the *Pollard* rule to the marginal sea. Hence, while a three-mile boundary was expressly confirmed for all coastal States, the right of the Gulf States to prove boundaries in excess of three miles was preserved. (footnotes omitted).

¹⁰⁸ 382 U.S. 288 (1965).

¹⁰⁹ See UNITED STATES DEPT OF THE INTERIOR, PETROLEUM PRODUCTION, DRILLING AND LEASING OF THE OUTER CONTINENTAL SHELF (May 1966)

¹¹⁰ *United States v. Louisiana*, 363 U.S. 1 (1960); *United States v. Florida*, 363 U.S. 121 (1960); *United States v. Louisiana*, 364 U.S. 502 (1960).

Louisiana's Claims

Louisiana contended that it had a three-league maritime boundary which existed "at the time" it was admitted to the Union. The Act of Congress admitted the State to the Union in 1812¹¹¹ described its boundaries as follows:

[B]eginning at the mouth of the river Sabine; thence, by a line to be drawn along the middle of said river, including all islands to the thirty-second degree of latitude; thence, due north, to the northernmost part of the thirty-third degree of north latitude; thence, along the said parallel of latitude, to the river Mississippi; thence, down the said river, to the river Iberville; and thence, along the middle of the said river, and lakes Maurepas and Ponchartrain, to the gulf of Mexico; thence, bounded by the said gulf, to the place of beginning, *including all islands within three leagues of the coast* (emphasis added).

The Court rejected Louisiana's claims that the concluding clause "including all islands within three leagues of the coast" should be read to mean that Congress fixed as the State's seaward boundary a line three leagues from its coast, and that such a reading is supported by the State's preadmission history and by subsequent events. The Court instead held:

The boundary line is drawn down the middle of the river Iberville "to the gulf of Mexico," not *into* it for any distance. The State is thence to be bounded "*by the said gulf*," not by a line located three leagues out in the Gulf, "to the place of beginning," which is described as "*at the mouth of the river Sabine*," not somewhere beyond the mouth in the Gulf. (Emphasis added.) And while "all islands" within three leagues of the coast were to be included, there is no suggestion that all waters within three leagues were to be embraced as well. In short, the language of the Act evidently contemplated no territorial sea whatever.¹¹²

The Court noted that the Government conceded that

. . . all the islands which are within three leagues of Louisiana's shore and therefore belong to it under the terms of its Act of Admission, happen to be so situated that the waters between them and the mainland are sufficiently enclosed to constitute inland waters. Thus, Louisiana is entitled to the lands beneath those waters quite apart from the affirmative grant of the Submerged Lands Act, under the rule of *Pollard's Lessee v. Hagan*, 3 How. 212. Furthermore, since the islands

¹¹¹ 2 Stat. 701, 702 (1812).

¹¹² *United States v. Louisiana*, 363 U.S. at 67 (1960).

enclose inland waters, a line drawn around those islands and the intervening waters would constitute the "coast" of Louisiana within the definition of the Submerged Lands Act. Since that Act confirms to all States rights in submerged lands three miles from their coast, the Government concedes that Louisiana would be entitled not only to the inland waters enclosed by the islands, but to an additional three miles beyond those islands as well.¹¹³

The Court, however, declined to settle the location of the coastline of Louisiana or that of any other state, since that question was not before the Court. The Court rejected Louisiana's claims to a three-league maritime boundary, based on its preadmission history, on acts of sovereignty over the marginal sea and seabed, and on the acquiescence of the federal government therein; and postponed for later consideration a 1954 statute establishing the state's boundary at three leagues seaward of the line between inland and open waters, established by the Coast Guard.¹¹⁴ The Court decided only that "Louisiana is entitled to submerged-land rights to a distance no greater than three geographical miles from its coastlines, wherever those lines may ultimately be shown to be."

Mississippi's Claims

On March 1, 1817, Congress authorized the creation of the State of Mississippi, specifically setting out its boundaries, in part as follows:

. . . thence due south to the Gulf of Mexico, thence westwardly, *including all the islands within six leagues of the shore*, to the (emphasis added).

most eastern junction of Pearl river with Lake Borgne. . . .¹¹⁵
The Mississippi Constitution, approved by the Act admitting the State to the Union on December 10, 1817,¹¹⁶ contained an identical provision.

As in the case of Louisiana, the Court held that "an Act of Admission which refers to all islands within a certain distance of the shore does not appear on its face to mean to establish a boundary line that distance from the shore, including all waters and submerged lands as well as all islands." The Court, while holding that Mississippi is not entitled to rights in submerged lands lying beyond three geographical miles from its coast, expressed no opinion on the location of Mississippi's coastline.

¹¹³ *Id.*, n. 108.

¹¹⁴ Act 33 of 1954, LA. REV. STAT. § 49:1 (1956).

¹¹⁵ 3 Stat. 348 (1817).

¹¹⁶ 3 Stat. 472 (1817).

Alabama's Claims

The Court, for the same reasons, rendered a similar opinion with respect to Alabama's rights in submerged lands, holding that the pre-admission history of Alabama is essentially the same as that of Mississippi. Its Act of Admission¹¹⁷ incorporated the Enabling Act, which described its boundary in part as follows:

. . . thence, due south, to the Gulf of Mexico; thence, eastwardly, *including all islands within six leagues of the shore*, to the Perdido river ¹¹⁸ (emphasis added).

C. United States v. California

The decision of the United States Supreme Court in 1965, in the *California*¹¹⁹ case, has great significance for the States of Alabama, Mississippi, and Louisiana, in the determination of their respective coastlines, since the Court decided that the Submerged Lands Act would be interpreted in the light of the international Convention on the Territorial Sea and the Contiguous Zone¹²⁰ and that definitions of "inland waters" as contained in such Convention are adopted for purposes of the Submerged Lands Act. The Convention was adopted at the 1958 Conference on the Law of the Sea at Geneva; it was ratified by the United States on March 24, 1961 and on September 10, 1964, when the requisite number of nations had ratified it, the Convention went into effect. The Court stated that adoption of the definitions of the Convention "establishes a single coastline for both the administration of the Submerged Lands Act and the conduct of our future international relations" ¹²¹

¹¹⁷ 3 Stat. 608 (1819).

¹¹⁸ 3 Stat. 489, 490 (1817).

¹¹⁹ United States v. California 381 U.S. 139 (1965), 382 U.S. 448 (1965). Generally referred to as the second *California* case.

¹²⁰ U.N. Doc. A/C.13/L.52 (1958). See generally, Willis, *Recent Congressional Studies of Offshore Oil Operations*, 33 TUL. L. REV. 357 (1959); Gremillion, *A Current View of the Tidelands Dispute*, 12 INST. MIN. L. 17 (1965); Erel, *The Submerged Lands Act and the Geneva Convention on the Territorial Sea and the Contiguous Zone*, 41 TUL. L. REV. 555 (1967); Leach, *Locating the Baseline in Determining Territorial Jurisdiction Over Natural Resources in the Ocean Floor*, 9 S. TEX. L.J. 45 (1967); Gremillion, *The Tidelands Controversy and Louisiana's Experience in the Dispute*, 7 TUL. TIDELANDS INST. 77 (1963); 1 Shalowitz, *Shore and Sea Boundaries*, U.S. DEP'T OF COMMERCE AND COAST AND GEODETIC SURVEY PUBLICATION 10-1 (1962-64).

¹²¹ United States v. California, 381 U.S. at 165 (1965).

Before discussing the decision in the *California* case, however, it is necessary to digress to a discussion of the Convention on the Territorial Sea and the Contiguous Zone, for determining the meaning of "inland waters" as used in the definition of "coast line" in § 2(c) of the Submerged Lands Act of 1953.

Our principal concern is with Section II, entitled "Limits of the Territorial Sea." Article 3 of this section provides:

Except where otherwise provided in these articles, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.

This is the normal baseline, which generally follows the sinuosities of the coast except at bays, rivers and other such inlets. It has been the traditional position of the United States in delimiting territorial waters.

Article 7 defines a bay as a "well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast." An indentation is not to be regarded as a bay unless its area is as large as, or larger than, that of a semicircle whose diameter is a line drawn across the mouth of that indentation. The measurement across the mouth is along a line joining the low water marks of its natural entrance points. To be used in conjunction with the semicircle test is a 24-mile maximum closing line rule for bays. The Convention provides that, if the distance between the low water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks and the waters enclosed thereby shall be considered as inland waters provided the semicircle test is satisfied. Prior to the adoption of the Convention, the United States and a number of other nations of the world had used a ten mile closing line rule.¹²² These provisions do not apply to so-called "historic" bays (Para. 6 of Article 7).

The Convention also recognizes another type of baseline, i.e., a straight baseline. The essential difference between "normal" and "straight" baselines has been stated to be not that the former are "normal" and the latter "straight" but that the former are land baselines and the latter water baselines.¹²³ The Convention provides in Article 4 that "in localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity," a nation may employ a straight baseline method of delineating its inland waters. The

¹²² Leach, *supra* note 120 at 55.

¹²³ 4 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 139 (1965).

Convention provides that when this method is used, the line "must not depart to any appreciable extent from the general direction of the coast and that the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters." Paragraph 4 of Article 4 provides that where the method of straight baselines is appropriate, account may be taken of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by a long usage. It is clear from this paragraph that economic interests are not per se a justification for the use of straight baselines.

Article 10 of the Convention defines an island as a naturally formed area of land, surrounded by water, which is above water at high tide. An island has its own territorial sea which is to be measured in the same manner provided in the Convention for measuring the territorial sea off a mainland coast.

The "straight baseline" is a new development in international law. It had its inception in 1951 with the decision in the *Anglo-Norwegian Fisheries* case¹²⁴ in which the International Court of Justice upheld Norway's method of delineating an exclusive fisheries zone by drawing straight baselines connecting the outermost of the numerous islands and rocks that are located off the mainland coast of Norway, independent of the low water mark. This established a new system of baselines from which the territorial sea could be measured, provided certain geographic conditions existed. This decision was the foundation for the provision of the Convention concerning straight baselines.¹²⁵

Shalowitz points out¹²⁶ that "the mere existence of islands off a coast is not a ground for using straight baselines. What must be present is a continuous fringe of islands sufficiently solid and close to the mainland to form a unity with it." He also points out that no guidelines are laid out to determine when islands are in "the general direction of the coast."

Coming back to the *California* case, the Supreme Court rejected California's argument that because the Convention permits a nation to use the straight-baseline method for determining its seaward boundaries if its "coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity," the State is therefore free to use such boundary lines across the openings of its bays and around its islands. The Court held that while the Convention *permits* nations to adopt the straight-baseline method to define inland waters, the choice is for the federal government to make, not the individual states.

¹²⁴ *United Kingdom v. Norway*, [1951] I.C.J. 116.

¹²⁵ Shalowitz, *supra* note 120 at 30.

¹²⁶ *Id.* at 214, 215.

The Court said:

We agree with the United States that the Convention recognizes the validity of straight base lines used by other countries, Norway for instance, and would *permit* the United States to use such base lines if it chose, but that California may not use such base lines to extend our international boundaries beyond their traditional international limits against the expressed opposition of the United States.

The Court found that the official position of the United States was based on the 24-mile closing rule:

For nations which do not use a straight-base-line method to define inland waters, the Convention permits a 24-mile maximum closing line for bays and a "semicircle" test for testing the sufficiency of the water area enclosed. The semicircle test requires that a bay must comprise at least as much water area within its closing line as would be contained in a semicircle with a diameter equal to the length of the closing line. Unquestionably the 24-mile closing line together with the semicircle test now represents the position of the United States. (footnotes and citations omitted).

Applying the 24-mile closing rule together with the semicircle test to the bays along California's coast, the Supreme Court ruled that "Monterey Bay is inland water and that none of the other coastal segments in dispute fulfill these aspects of the Convention test." The Court applied the "normal baseline" method in measuring California's coastline (following the sinuosities of the shoreline) and rejected California's claim to the area between the mainland and offshore islands, some of which are more than 50 miles offshore. California had drawn the baseline around the seaward side of these islands, claiming all waters between them and the mainland as "inland waters."

How has this case affected subsequent "tidelands" litigation, particularly the states of Alabama, Mississippi, and Louisiana? Louisiana's coastline is more irregular and deeply indented than that of California, and is particularly suited to the use of the straight-baseline method, allowed under Article 4 of the Convention. Mississippi and Alabama have a "fringe of islands" offshore, which is also allowed under Article 4. A State Department legal advisor is quoted as saying: "Along the coasts of the continental United States . . . no situation appears to exist which could be construed as requiring the use of a straight baseline. However, three coastal areas are sufficiently complex to give pause to a consideration of the use of this method . . . [T]he Florida Keys and Mississippi Delta make up two very irregular coastal patterns."¹²⁷ According to Mr. Gre-

¹²⁷ 4 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 150, 151 (1965).

million, Attorney General of Louisiana: "There is every logical and reasonable ground existing for the use of the Geneva Convention in delineating and delimiting the Louisiana coast. . . . [A]ny other system would be antiquated, outmoded and unrealistic."¹²⁸

Although the Court held in the *California* case that the United States was committed to the use of a normal baseline for delineating the seaward limit of its inland waters, the Court agreed that the Convention "did permit the United States to use such baseline (straight baseline) if it chose." One writer comments as follows:

Where the facts warrant, there is authority for a nation to use the straight baseline method along portions of its coast while using a normal baseline for other portions of its coast line, so that the holding of the Court in the 1965 *California* case is not necessarily applicable to the remaining coast line of the United States should the Federal government decide that certain portions of the coast are sufficiently deeply indented and cut into as to warrant the use of the straight baseline method. (footnote omitted.)¹²⁹

D. Present Status of Coastline Controversy

Alabama

It is understood¹³⁰ that, pursuant to an agreement reached between federal authorities and the Alabama Department of Conservation covering the location of the so-called three-mile line offshore the State of Alabama, a map has been prepared and is in use for leasing purposes in the offshore areas. However, such line "would be subject to change at any time in the future that a Supreme Court decision or congressional act would give substance to a variation in the line's location." In other words, the line as shown on the map is for present working purposes and oil companies or other interested parties now known whom to approach for leases or seismic permits in the waters offshore Alabama. It is understood that, for convenience, seismic permits are issued by the Alabama Department of Conservation covering both state territory and the area beyond. On the map, the three-mile state line is drawn from the seaward side of the islands offshore, i.e., Dauphin and Pelican. These islands appear to be sufficiently linked to the land domain to be subject to the regime of internal waters; and Mobile Bay is certainly inland waters of the state by any criteria.

¹²⁸ Gremillion, *supra* note 120 at 33 (1965).

¹²⁹ Leach, *supra* note 120 at 53.

¹³⁰ Letter dated April 23, 1969, to the author from William G. O'Rear, Assistant Attorney General, State of Alabama.

The Texas Boundary Case

While a discussion of Texas' leasing procedures is beyond the scope of this paper, nevertheless, a recent decision by the United States Supreme Court on the question of Texas' coastline has significance for the other states bordering on the Gulf of Mexico.

In *United States v. Louisiana*,¹³¹ decided December 4, 1967, the Supreme Court held that the three-league (nine-mile) belt of submerged lands beneath the Gulf of Mexico granted to Texas by the Submerged Lands Act of 1953 was not to be measured from the edge of artificial jetties built in the gulf by Texas since 1845, as claimed by Texas, but from Texas' coastline as it existed in 1845 when Texas was admitted to the Union. Subsequently, Texas and the United States reached agreement as to the location of the 1845 coastline but it has been modified by extensive erosion and some accretion in the intervening period of more than a century. A dispute arose between the Government and Texas as to whether the Act's limitation in § 2(b) that in no event shall the boundaries of the grant of submerged lands "be interpreted as extending from the coast line * * * more than 3 marine leagues into the Gulf of Mexico," is to be read as measuring from the 1845 coastline, as Texas contended, or from the coastline as it exists currently or at any time in the future, as contended by the government. Texas claimed that it would be denied substantial submerged acreage as a result of post-1845 erosion and that the federal government's position would present practical difficulties for mineral leases in the area. The Supreme Court granted oral argument on this point and decided, on March 3, 1969,¹³² that the term "coast line" means the modern, ambulatory coast line." The Court simply stated that Texas must look to Congress for any relief in this situation. In its decision the Court emphasized its previous adoption, in the *California* case,¹³³ of the definitions formulated by the Convention on the Territorial Sea and the Contiguous Zone as the criteria to be used in interpreting the meaning of "inland waters" as used by Congress in the Submerged Lands Act. The Court stated:

The Convention defines "coast line" as the modern, ambulatory coast line; the decree entered several months later in accordance with our opinion in *California* expressly provides that "The coast line is to be taken as heretofore or hereafter modified by natural or artificial means * * *." 382 U.S. 448, 449 (1966).

We said further in *California* that "This [adoption of the Convention's definitions] establishes a single coast line for * * *

¹³¹ 389 U.S. 155 (1967).

¹³² *United States v. Louisiana* (The Texas Boundary Case), _____, U.S. _____, 89 S.Ct. 768 (1969).

¹³³ *United States v. California*, 381 U.S. 139 (1965).

the administration of the Submerged Lands Act * * *." 381 U.S., at 165. Our conclusion in this case that "coast line" means the modern, ambulatory coastline therefore necessarily follows from our decision in *California*. See *U.S. v. Louisiana*, *supra*, 389 U.S., at 162, n. 2.

There is no basis for a finding that "coast line" has a different meaning for the purpose of determining the baseline for measurement of the three-league maximum limitation. . . . *Rather it seems evident that Congress meant that the same "coast line" should be the baseline of both the three-mile grant and the three-league limitation.*" (emphasis added).

Louisiana

In 1954, Louisiana by legislation¹³⁴ accepted and approved as its coastline the line between inland and open waters which was finally defined in 1953 by the United States Coast Guard survey of the coast.¹³⁵

In *United States v. Louisiana*¹³⁶ Louisiana argued that its baseline was coextensive with the Coast Guard Line. The United States' brief in support of a motion for judgment took the position that the baseline was not at issue in the pending proceeding but that if it were, the Coast Guard Line was not the proper line of demarcation. The brief stated:

The Act of 1895 did nothing more than to provide for rules of navigation, and for delimiting the waters where the Inland Rules were to be followed, as distinguished from the International Rules . . .

. . . except for about 60 nautical miles of its length nearest the Mississippi boundary, the Coast Guard Line runs between navigational buoys and one lighthouse, situated distances of some 1-½ to 10 nautical miles seaward from the nearest mainland or island, as shown on charts of the Coast and Geodetic Survey. The line itself runs much more than 20 nautical miles from the nearest land at some places. Inland waters in the jurisdictional sense are those that are so landlocked as to be within the exclusive jurisdiction of the littoral nation. However one is to define "landlocked" waters . . . , they cannot include, as does the Coast Guard Line, a belt of water extending far seaward of the outermost islands and points of land.¹³⁷

The Court declined to rule on this claim at that time, stating that it would be postponed for future consideration. Shalowitz comments on this as follows:

¹³⁴ LA. REV. STAT. § 49:1 (1954).

¹³⁵ 28 Stat. 672 (1895), 33 U.S.C. § 151 (1964).

¹³⁶ 363 U.S. 1 (1960).

¹³⁷ Brief of United States No. 11, Original, at 133, 134; 363 U.S. 1, 79 (1960).

It is sometimes thought that the lines established by the United States Coast Guard for separating areas of the sea where the Inland Rules of the Road apply from those where the International Rules apply define the limits of inland waters. This, however, is erroneous, and in *United States v. Newark Meadows Improvement Co.*, 173 F.426, 428 (1909), it was held that such lines have no application other than "to inform navigators where the Inland Rules of Navigation, as distinguished from the International Rules, become applicable."¹³⁸

In October, 1967, Louisiana, through her Attorney General, filed with the Court a Motion for Entry of Supplemental Decree No. 2, requesting a decree fixing Louisiana's coastline as defined by the Coast Guard in 1953 and declaring that the State is entitled to all "the lands, minerals and other natural resources underlying the Gulf of Mexico that are landward of a line three geographical miles seaward of such coastline." Louisiana took the position in this motion that "action taken by the Commandant of the Coast Guard, pursuant to the Act of Congress of February 19, 1895, governs." Louisiana also based this claim on § 4 of the Submerged Lands Act, which provides:

Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries.

In a 1965 article, the Attorney General of Louisiana states¹³⁹ that there are several obvious advantages to Louisiana inherent in the Geneva Convention, such as the following:

... except for Cameron and Vermilion parishes, the coast of Louisiana is highly irregular and heavily indented, more so than probably any other state in the Union. In following the "general direction of the coast," as the convention requires, the use of straight baselines would not only cause an appreciable departure seaward from the irregular shore line, which in many instances are water boundaries, but the coast of La. would approach a high degree of symmetry and breadth. Economic interests in Louisiana's coastal waters, extending to substantial distances from shore, are largely identical with the economic interests on the mainland, and the convention provides that such relationships may be taken into consideration in establishing the coast line. Use of the 24 mile closing line for bays would also materially broaden and lengthen the Louisiana coast.

¹³⁸ Shalowitz, *supra* note 120, n. 158.

¹³⁹ Gremillion, *supra* note 120.

Louisiana's motion regarding the Coast Guard Line was rejected by the Supreme Court on March 3, 1969.¹⁴⁰ The Court held that "that part of Louisiana's coastline which, under the Submerged Lands Act, consists of 'the line marking the seaward limit of inland waters,' is to be drawn in accordance with definitions of the Convention on the Territorial Sea and the Contiguous Zone." Such Convention was applied to the Louisiana coast in resolving a number of the particular disputes; and a Special Master was appointed to make a preliminary determination of the precise boundaries of certain other submerged lands owned by Louisiana in the Gulf of Mexico.

A strong dissent was registered by Justices Black and Douglas for the expressed purpose of putting a stop to "eternal litigation." Particular exception was taken to the Court's adhering blindly to its previous holdings wherein the Convention was resorted to in order to define the "inland waters" along Louisiana's coast, which has wholly different geographic conditions from those of California, i.e., the coast of California is rock-hard and comparatively straight, whereas, the shoreline of Louisiana is constantly shifting as the Mississippi River and violent gulf storms remold the soft silt-like delta soil. Louisiana had argued that the Court was free in this case to adopt a different definition more suited to the peculiarities of the highly unstable Louisiana shore. However, the Court stated that its adoption of the Convention definitions in *United States v. California* was "'for the purposes of the Submerged Lands Act,' and not simply for the purpose of delineating the California coastline. Congress left to this Court the task of defining a term used in the Act, not of drawing state boundaries by whatever method might seem appropriate in a particular case."

On the argument by Louisiana that the view adopted will result in an ambulatory coastline, leading to endless litigation, the Court stated:

Finally, we note that if the inconvenience of an ambulatory coastline proves to be substantial, there is nothing in this decision which would obstruct resolution of the problems through appropriate legislation or agreement between the parties. Such legislation or agreement might, for example, freeze the coastline as of an agreed-upon date.

Even if we were free to adopt varying definitions of inland waters for different portions of the United States coast, we are not convinced that the policy in favor of a certain and stable coastline, strong as it is, would necessarily outweigh countervailing policy considerations under the Submerged Lands Act. We recognized in *California* the desirability of "a

¹⁴⁰ *United States v. Louisiana (Louisiana Boundary Case)*, — U.S. —, 89 S.Ct. 773, 787 (1969).

single coastline for both the administration of the Submerged Lands Act and the conduct of our future international relations." 381 U.S., at 165, 85 S.Ct. at 1415. The adoption of the "Inland Water Line" for Louisiana would be completely at odds with this desideratum. *Moreover, adoption of a new definition of inland waters in this case would create uncertainty and encourage controversy over the coastlines of other States, unsure as to which, if either, of the two definitions would be applied to them.* (emphasis added).

The Court's position on the question of "fringes of islands" is of particular interest since this could apply also to the situation in the Mississippi Sound.¹⁴¹ The Court stated:

At several places the question is raised whether areas between the mainland and fringes or chains of islands along the coast are inland waters. *The parties agree that no article of the Convention specifically provides that such areas are inland waters.* Louisiana argues that they are inland waters, under any one of several theories: that such island fringes form the perimeter of bays under Article 7, that straight baselines must be drawn along the islands under Article 4, or that the waters should be deemed "inland" under general principles of international law which antedate and supplement the Convention on the Territorial Sea and the Contiguous Zone. *The position of the United States is that such island chains can be taken into account as enclosing inland waters only by drawing straight baselines; yet the decision whether to draw such baselines is within the sole discretion of the Federal Government, and the United States has not chosen to do so.* (emphasis added).

The Court pointed out that the method of applying straight baselines to island fringes was recognized and applied by the International Court of Justice in the *Fisheries Case*,¹⁴² in which Norway was held legitimately to have drawn straight baselines along the "skjaergaard," literally a "rock rampart" composed of hundreds of thousands of insular formations which ringed the mainland; that thereafter it was agreed that no concrete rules should be drawn up for the uniform treatment of such island fringes, but that "each nation was left free to draw straight baselines along suitable insular configurations if it so desired."

¹⁴¹ The United States had conceded at an early stage of this litigation that one large area—consisting of Chandeleur Sound and Breton Sound between the northeastern shores of the Mississippi River Delta and the Chandeleur Islands chain—belonged to Louisiana and decided not to withdraw its concession, "while asserting that the sounds are not necessarily inland waters under the Convention." 22 L.Ed. 2d 86, 87 (1969).

¹⁴² *United Kingdom v. Norway*, [1951] I.C.J. 116.

In other words, "the deliberate decision [of the drafters of the Convention] was that such island formations are not to be treated differently from any other islands unless the coastal nation decides to draw straight baselines." The Court reiterated that in the second *California* case it held that "the choice under the Convention to use the straight baseline method for determining inland waters claimed against other nations is one that rests with the Federal Government, and not with the individual States." In view of the assertion by the United States that it "has not drawn and does not want to draw straight baselines along the Louisiana coast," the Court felt this disclaimer was conclusive of the matter and declined to reconsider its holding in *California*, even though Louisiana pressed its argument that its coast is so perfectly suited to the straight baseline method and even though the Court itself agreed that such method was designed for precisely such coasts as the Mississippi River Delta area.

Louisiana further contended that the United States was estopped from denying the "inland water" status of areas between the mainland and the offshore islands by its concession in earlier stages of this litigation that such areas were inland waters. Such a concession had been mentioned by the Court in *United States v. Louisiana*.¹⁴³ The Court, however, noted that it had "placed no imprimatur of approval on that position" and did not consider the United States to be bound by it.¹⁴⁴

The concluding portion of the opinion is perhaps the most provocative since the Court leaves unresolved the question of what constitutes historic inland waters. The Court points out that historic bays are not defined by the Convention and therefore the Court must fall back upon general principles of international law. Since the "concept of historic waters is still relatively imprecise," it is the task of the Special Master to determine by preliminary investigation whether any of the waters off the Louisiana coast are historic bays, as claimed by the State. Louisiana stressed its continuous assertion of authority over all the waters of the Mississippi River Delta, and East Bay in particular, as proof that they are inland waters, within the meaning of Article 7(6) of the Convention, "notwithstanding their failure to meet the geographical requirements and the United States' refusal to draw straight baselines." The United States' position is that, by merely refusing to recognize state activities in this area, it can "prevent judicial recognition of a ripened claim to historic title." The Court, however, declined to go this far, and stated that, as noted previously in the *California* case, a disclaimer by the federal government would not be decisive in all circumstances.

¹⁴³ 363 U.S. 1, 66-67, n. 108.

¹⁴⁴ 22 L. Ed.2d 89, n. 97.

Thus, the Court is unwilling to give the United States "the same complete discretion to block a claim of historic inland waters as it possesses to draw straight baselines." The Special Master is to "consider state exercises of dominion as relevant to the existence of historic title," and assess such evidence as supporting a hypothetical claim of historic waters by the national sovereign and opposed by another nation. The Court will then decide, on the basis of the Special Master's findings, whether the historic evidence in favor of Louisiana is "clear beyond doubt."

Alabama and Mississippi might also use the same arguments relied on by Louisiana, since historically these states have long exercised dominion in various ways over their offshore areas in the Gulf of Mexico.

Louisiana has filed a petition for rehearing,¹⁴⁵ assigning eight errors of the Court, one of which challenges the authority of the Solicitor General to disclaim and thereby contract American territory "contrary to the interest of this nation." Louisiana's position is stated as follows:

The Court has set a limit to the extent of American territory which the Solicitor General, in the name of the United States, may disclaim or abandon by emphasizing the "impermissible contraction of territory against which we cautioned in *United States v. California*." The difference between the view asserted for Louisiana and the view asserted by the Court is that Louisiana contends it is beyond the power, beyond the authority of the Solicitor General in the name of the United States, to contract the territory of the United States at all. Finally, Louisiana welcomes the opportunity to protect the historic title of the United States to waters to which no foreign power has ever asserted a claim against the United States or any of Louisiana's previous sovereigns. We do not believe that the Solicitor General or anyone acting for him should be allowed to strip the United States of this territory by opposing Louisiana's claims as if he were acting for a foreign power hostile to the United States.

Mississippi

The State does not consider the matter to be in dispute or question, taking the view that the entire area of the Mississippi Sound is "inland water," and that the coastline (baseline) begins on the seaward side of the island chain south of the Sound.¹⁴⁶ This is further borne out by the fact that the oil and gas leasing map presently being prepared by the

¹⁴⁵ The petition for a rehearing was denied April 21, 1969. The Chief Justice and Mr. Justice Marshall took no part in the consideration or decision of this petition.

¹⁴⁶ Interview with Martin R. McLendon, Assistant Attorney General on April 9, 1969.

State Mineral Lease Commission shows the baseline drawn along the outer edges of the fringe of islands extending from Isle aux Petit Bois to Cat Island, with the 6000-acre blocks in such three-mile area claimed by the state. This puts Mississippi's "coastline" an "average distance of 14 miles from the mainland" with "the seaward boundary of the state an average distance of 17 miles from the mainland, giving to the state the water resources of a sizable area of the Gulf as well as all of the Mississippi Sound east of the Louisiana boundary."¹⁴⁷

The weight of authority is in favor of drawing the coastline in such manner. Article 4 of the Convention on the Territorial Sea and the Contiguous Zone authorizes the use of the straight-baseline system in localities where "there is a fringe of islands along the coast in its immediate vicinity," the only requirements being that the line must not depart to any appreciable extent from the general direction of the coast and that the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters. The islands along the southern coast of Mississippi fit this description: They lie in the general direction of the coast and are closely linked to each other and to the land domain.

The straight-baseline system is permissive rather than mandatory. Article 4 of the Convention provides that such a method "may be employed" in delimiting the territorial sea. One writer concludes, from the attitude of the federal government in the *California* case, where the federal government refused to adopt straight baselines for coastal islands on the ground that the waters between the islands and the mainland served as a useful route of communications between two areas of open sea:

It seems doubtful, however, whether the executive will be disposed to enlarge the states' inland waters by the use of the straight baseline system even under other circumstances.¹⁴⁸

In applying the rules of the Convention, two essential questions will be the maximum permissible length of baselines and the maximum distance from the shore for any point on such line. The Convention did not set any guidelines for these. According to Shalowitz,¹⁴⁹ the International Law Commission, in its draft rules, "sought to incorporate

¹⁴⁷ P. Williams, *Law of Water Resources of the State of Mississippi: A Multifactorial, Policy-Oriented Study of Legal Prescriptions Relating to Water Use and Control*, WATER RESOURCES RESEARCH INSTITUTE, MISSISSIPPI STATE UNIVERSITY 6 (1966).

¹⁴⁸ Erel, *supra* note 120 at 575.

¹⁴⁹ Shalowitz, *supra* note 120 at 217-18.

a maximum length of 10 miles for a straight baseline and a maximum distance of 5 miles from the coast for any point on such line. But in the final consideration of this rule all mention of length and distance from the coast was deleted. At the Conference, a finite limit was adopted in Committee, but this did not obtain a two-thirds majority, and no maximum is provided."

This ambiguity in the Convention as to which coastal islands cause the waters between the islands and the mainland to be inland leaves intact the prior position of the United States on the subject.¹⁵⁰ Professor Ereli summarizes this as follows:

According to the Acting Secretary of State's letter of November 3, 1951, replying to the Attorney General's inquiry about the United States practice regarding groups of islands, the United States took the position that each island possessed its own belt of territorial waters measured in the same manner as in the case of the mainland. However, the problem of delimiting territorial waters may arise with respect to a strait, whether between the mainland and offshore island or between two islands or between two mainlands. The United States view is that a strait connecting two seas having the character of high seas, and both entrances do not exceed six nautical miles in width, all of the waters of the strait should be considered territorial waters of the coastal state. In case the strait formed a channel of communication to an inland sea the rules regarding bays should apply.

The United States' position has also been stated to be as follows:

Islands have their own territorial seas, which may or may not coalesce with the territorial sea of the mainland Islands within 6 miles of each other have territorial seas which of necessity overlap and in steppingstone fashion may extend the sovereignty of the state over distances far beyond the mainland coast. . . . [T]he channel islands, off the coast of southern California (Catalina, San Clementi, Santa Rosa), are too distant from the coast for their territorial seas to merge with that of the mainland.¹⁵¹

Since none of the openings from the sea into the Mississippi Sound is as much as six miles wide, (see *Louisiana v. Mississippi*, *infra*) even under the federal government's pre-Convention position, Mississippi's territorial sea would extend three miles from each of its islands and, since

¹⁵⁰ Ereli, *supra* note 120 at 575.

¹⁵¹ G. Percy, *Measurement of the U.S. Territorial Sea*, U.S. DEP'T OF STATE, BULL. No. 1044 (1959). (Quoted in 4 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 281-82 (1965).

they are less than six miles apart, would overlap, forming a continuous belt of territorial sea, and, consequently, "inland waters" of the State.¹⁵²

There is also judicial precedent for Mississippi's claim that the Mississippi Sound is inland water. This was recognized in 1905 by the United States Supreme Court in *Louisiana v. Mississippi*,¹⁵³ a suit to establish the boundary between the two states. Although it would be classified as dicta it is still persuasive that the Court stated that the Mississippi Sound, which leads to Lake Borgne, an island sea, is inland water:

Mississippi's mainland borders on Mississippi Sound. This is an enclosed arm of the sea, wholly within the United States, and formed by a chain of large islands, extending westward from Mobile, Alabama, to Cat Island. *The openings from this body of water into the Gulf are neither of them six miles wide.* Such openings occur between Cat Island and Isle à Pitre; between Cat and Ship Islands; between Ship and Horn Islands; between Horn and Petit Bois Islands; between Petit Bois and Dauphin Islands; and between Dauphin Island and the mainland on the west coast of Mobile Bay. The maps show all this, and, among others, reference may be made to Jeffrey's map of 1775, given in the record, and which in reduced form is reproduced from Jeffrey's Atlas of 1800 as the frontispiece of Vol. II Adams' History of the United States. (emphasis added).

Professor Ereli comments concerning this case:

¹⁵² Williams, *supra* note 147 at 8. Williams states: "The importance of this geographical fact is that, in international law, a nation can exercise sovereignty over a belt of sea extending three miles from its coast, the range of eighteenth century coastan [*sic*] cannon." Another explanation of the limit of the territorial sea is given by Professor Torsten Gihl in his article *The Baseline of Territorial Sea*, in II SCANDINAVIAN STUDIES IN LAW, 119, 121, 122 (F. Schmidt ed. 1967).

He comments as follows:

It has been demonstrated . . . that in reality both the three-mile limit and the four-mile limit had the same origin, i.e., the unit of measure used at sea. In the 18th century this, in countries along the Atlantic Coast and the Mediterranean, was a sea league . . . corresponding to three miles When, at the end of the 18th century, efforts, began to state the limits of the territorial sea in linear measurements instead of the measures used earlier, e.g., the range of vision, the range of a cannon shot, etc., the ordinary measurements for the determination of distances at sea or multiples thereof were naturally used; and, therefore, there gradually developed a four-mile limit in the Scandinavian countries and a three-mile limit in the countries along the Atlantic Coast.

¹⁵³ 202 U.S. 1 (1905). In this case Mississippi alleged that it "had 'exercised sovereignty and jurisdiction over said waters within 18 miles of her shore aforesaid,' and that by her statutes, as codified in 1857, had asserted such jurisdiction. And that, by the legislation of Congress and the state, the 'Mississippi sound' was recognized as a body of water, 6 leagues wide, wholly within the state of Mississippi, from Lake Borgne to the Alabama line, separate and distinct from 'the Gulf of Mexico.'" *Id.* at 18.

In *Louisiana v. Mississippi*, the Court classified the Mississippi Sound, which leads to Lake Borgne, an inland sea, as inland water. The openings between the two extreme islands and the mainland, and between each island did not exceed six miles, a distance which at that time the United States advocated for bay closure.¹⁵⁴

Article 4 of the Convention also provides that, where the method of straight baselines is justified, account may be taken "of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by a long usage." For more than 150 years, Mississippi has exercised jurisdiction over fishing and oystering in the Sound, and has since 1939 granted many oil leases in the area. Parham Williams comments on this as follows:

[A] large and valuable seafood canning and processing industry has developed at Biloxi and Pascagoula which employs thousands of people and makes a vital contribution to the financial resources of the State. If the seaward boundary of the State were fixed as a line three geographical miles distant from the mainland, three-fourths of the Sound would be opened to foreign fishermen and the Mississippi industry would be jeopardized This prescription [Article 4, paragraph 4 of the Convention] clearly authorizes [*sic*] the drawing of the baseline along the seaward edges of the island fringe, thus preserving the character of the Sound as inland waters and protecting the vital economic interests of the State's fishing industry.¹⁵⁵

E. Conclusion

It seems now fairly clear that the federal government does not favor the straight-baseline method of determining offshore boundaries and that the Supreme Court has supported this position. Not only in the second *California* case, but also in the recent Texas and Louisiana Boundary Cases, the Court has adopted the definitions formulated by the International Convention on the Territorial Sea and the Contiguous Zone, holding that the choice lies with the federal government and not with the individual states as to the method to be used. The straight-baseline system, it has been noted, is permissive rather than mandatory and the United States has traditionally favored the normal baseline method (which was applied in *California*) together with the 24-mile closing line for bays.

¹⁵⁴ Erel, *supra* note 120 at 577.

¹⁵⁵ Williams, *supra* note 147 at 7.

As the Court pointed out in the recent *Louisiana* decision, the states may have recourse to Congress for relief. It may well require additional clarifying legislation by Congress to correct the inequity of the situation, as far as the states are concerned, as well as to clear up confusion created in oil and gas leasing in the Gulf where an ambulatory coastline is used instead of a stationary, stable line demarcating federal/state territory, and in order to carry out the original intention of Congress in passing the Submerged Lands Act. Justice Black, in his dissent in the second *California* case, stated that Congress intended to restore to the states the full extent of their historic boundaries, "which of course included all the lands, bays, harbors and channels within those boundaries—their historic coastlines—and three miles or leagues of marginal sea."¹⁵⁶ In his dissents in the recent Texas and Louisiana Boundary Cases, he also emphasized the fact that endless litigation will result from the refusal of the Supreme Court to consider peculiar geographical factors in these situations.

¹⁵⁶ 381 U.S. at 194 (1965).

MISSISSIPPI JURY SELECTION: A PROPOSED STATUTE

John G. Corlew*

Since its decision in *Harper v. State* in 1965,¹ the Mississippi Supreme Court has reversed several criminal convictions because of exclusion or underrepresentation of members of the defendant's class from jury service.² Potentially, every criminal defendant in the state who can establish underrepresentation in the jury selection process of any "cognizable class" of which he is a member may win a retrial of any conviction against him. Add to this prospect the series of actions being undertaken in federal court attacking the jury selection procedures of various Mississippi counties,³ and it is evident that a problem of crisis

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¹ 251 Miss. 699, 171 So.2d 129 (1965).

² See, e.g., *Williams v. State*, 210 So.2d 780 (Miss. 1968); *Harris v. State*, 206 So.2d 829 (Miss. 1968); *Pollard v. State*, 205 So.2d 286 (Miss. 1967); *Fondren v. State*, 199 So.2d 625 (Miss. 1967); *Watts v. State*, 196 So.2d 79 (Miss. 1967); *Shinall v. State*, 187 So.2d 840 (Miss. 1966); *Black v. State*, 187 So.2d 815 (Miss. 1966); *Bass v. State*, 254 Miss. 723, 182 So.2d 591 (1966); *Hopkins v. State*, 254 Miss. 484, 182 So.2d 236 (1966). In *Thompson v. State*, 188 So.2d 239 (Miss. 1966), the Supreme Court allowed a petition for writ of error *coram nobis* to be filed in the lower court on the grounds of underrepresentation of members of the defendant's class in the jury selection process. Challenges have been made in several other cases and no discrimination found. See, e.g., *Davis v. State*, 204 So.2d 270 (Miss. 1967); *Boyd v. State*, 204 So.2d 165 (Miss. 1967); *McLelland v. State*, 204 So.2d 158 (Miss. 1967); *Reed v. State*, 199 So.2d 803 (Miss. 1967). Of course criminal convictions may also be open to review via habeas corpus in the federal courts, and some convictions have been reversed for underrepresentation of defendant's class through use of that route. See, e.g., *Ellzey v. Breazeale*, 277 F. Supp. 948 (S.D. Miss. 1967). In this case an 18-year-old Negro defendant had entered a plea of guilty without having been advised of his right to challenge the jury selection system. The Mississippi Supreme Court allowed the plea to stand, ruling that by entering a guilty plea the defendant waived his right to object to the grand jury. *Ellzey v. State*, 196 So. 2d 889 (Miss. 1967). On petition for writ of habeas corpus to the federal district court, the conviction was reversed, the district court holding that defendant's plea did not waive his right to challenge the grand jury and that under representation of Negroes in the jury selection system violated the defendant's constitutional rights. See also *King v. Cook*, 298 F. Supp. 584 (N.D. Miss. 1969).

³ See, e.g., *Daly v. Perry*, Civil Action No. EC6916-S (N.D. Miss., June 3, 1969); *Ford v. White*, 299 F. Supp. 772 (S.D. Miss. 1969); *Love v. McGee*, 297 F. Supp. 1314 (S.D. Miss. 1969). *Raiford v. Dillon*, 297 F. Supp. 1307 (S.D. Miss., 1969); *Johnson v. Gibbs*, Civil Action No. WC69-6S (N.D. Miss., Jan. 25, 1969).

proportions faces the Mississippi jury selection system. This article proposes statutory action designed to eliminate the dual threat of criminal conviction reversals and injunction of a county's jury selection process.

I. THE PROBLEM

Although the Mississippi Supreme Court had reversed criminal convictions for underrepresentation of a class prior to its decision in *Harper v. State*,⁴ that case has proven to be the first in a rash of such decisions by the court in the past three years.⁵ All the Mississippi cases have involved exclusion of Negroes from jury service,⁶ as have most of the United States Supreme Court decisions on this point.⁷ However, the rationale has been extended to the exclusion of other ethnic groups,⁸ and the language used by the courts is broad enough to cover the exclusion of any definable class, whether ethnic or otherwise. Indeed, the United States Supreme Court has struck down juries from which daily wage earners⁹ and women¹⁰ were excluded as a class. However, these cases arose in federal courts and the Supreme Court based the decisions on its supervisory power over the lower federal courts, and not on a finding

⁴ The first such decision came in *Farrow v. State*, 91 Miss. 509, 45 So. 619 (1908). In *Seay v. State*, 212 Miss. 712, 55 So.2d 430 (1951), and *McGee v. State*, 203 Miss. 592, 33 So.2d 843 (1948), the Supreme Court relied on the United States Supreme Court decision in *Patton v. Mississippi*, 332 U.S. 463 (1947), in reversing convictions because of class exclusion from jury service. *Gordon v. State*, 243 Miss. 750, 140 So. 2d 88 (1962), quashed an indictment because of class exclusion. But in *Kennard v. State*, 240 Miss. 488, 128 So.2d 572 (1961), *Cameron v. State*, 233 Miss. 404, 102 So.2d 355 (1958), and *Gipson v. State*, 203 Miss. 434, 35 So.2d 327 (1948), the Supreme Court rejected arguments of class exclusion from jury service, holding that the evidence in each of the cases was insufficient to establish such exclusion.

⁵ Cases cited *supra* note 2. Justice Brady warned, in one of the first such decisions after *Harper v. State*, that: "Currently the rule is inexorable, and wise men will take note and be governed accordingly." *Hopkins v. State*, 254 Miss. at 487, 182 So.2d at 237 (1966). The legislation proposed in this article is an attempt to heed Justice Brady's warning by establishing a statutory selection scheme designed to overcome challenges to the jury selection process.

⁶ Cases cited note 2 *supra*.

⁷ See, e.g., *Whitus v. Georgia*, 385 U.S. 545 (1967); *Arnold v. North Carolina*, 376 U.S. 773 (1964); *Eubanks v. Louisiana*, 356 U.S. 584 (1958); *Patton v. Mississippi*, 332 U.S. 463 (1947); *Norris v. Alabama*, 294 U.S. 587 (1935). The first application of the rule by the United States Supreme Court was in *Strauder v. West Virginia*, 100 U.S. 303 (1880).

⁸ See, e.g., *Hernandez v. Texas*, 347 U.S. 475 (1954), which involved exclusion from jury service of persons with Mexican or Latin American names.

⁹ *Thiel v. Southern Pac. Co.*, 328 U.S. 217 (1946).

¹⁰ *Ballard v. United States*, 329 U.S. 187 (1946); *Glasser v. United States*, 315 U.S. 60 (1942).

of unconstitutionality of the particular jury selection systems.¹¹ But the Fifth Circuit has ruled that the systematic exclusion of daily wage earners from jury service is a violation of the Due Process and Equal Protection Clauses of the Constitution.¹²

The language of the Supreme Court decisions and the rationale of the Fifth Circuit holding are that trial by jury "contemplates an impartial jury drawn from a cross-section of the community."¹³ If a definable class—Negroes, women, daily wage earners or whatever—is excluded from the jury selection process, a "cross-section of the community" is not represented. Yet, while token inclusion of members of a class on jury venires will not satisfy constitutional requirements,¹⁴ proportional representation is not required¹⁵ and an indicting or convicting jury need not include a representative of the defendant's particular class or racial group.¹⁶

The problem, thus, is to devise a jury selection system which will substantially represent all definable classes of the community so that it may fairly be said that a particular jury is drawn from a cross section of the community. While the Mississippi and United States Supreme Court decisions have not reached jury selection systems excluding other than ethnic groups, the logic of their decisions does extend to such situations. It is to be expected that, given the proper case, both Courts would extend their holdings to embrace non-ethnic class exclusion, as the Fifth Circuit did in *Labat v. Bennett*.¹⁷ As a practical matter, then, a legislative solution to the jury selection problem should seek not only to obviate the immediate problem posed by the ethnic group exclusion cases, but should also foresee and deal with objections which might be lodged because of other class exclusions.

¹¹ The *Thiel* case, for example, did not mention the Constitution, discussing only the statutory requirements for jurors in the federal system and under state law and concluding that "... [w]e cannot sanction the method [blanket exclusion of daily wage earners] by which the jury panel was formed in this case." 328 U.S. at 225 (1946).

¹² *Labat v. Bennett*, 365 F.2d 698 (5th Cir. 1966), *cert. denied*, 386 U.S. 991 (1967), *commented on in* 20 VAND. L. REV. 910 (1967).

¹³ *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 220 (1946).

¹⁴ *See, e.g., Cassell v. Texas*, 339 U.S. 282 (1950); *Smith v. Texas*, 311 U.S. 128 (1940).

¹⁵ *See, e.g., Swain v. Alabama*, 380 U.S. 202 (1965); *Brown v. Allen*, 344 U.S. 443 (1953).

¹⁶ Cases cited note 15 *supra*.

¹⁷ 365 F.2d 698 (5th Cir. 1966), *cert. denied*, 386 U.S. 991 (1967). In *Hansen v. United States*, 393 F.2d 763 (8th Cir.), *cert. denied*, 393 U.S. 833 (1968), the defendant complained of the exclusion of farm laborers as a class from jury service. The court found no evidence of such exclusion, but its opinion clearly indicated that had such proof been forthcoming its decision would have been for the defendant.

II. POSITIVE VALUES FOR A JURY SELECTION SYSTEM

In devising a jury selection plan which will withstand the challenges—current and potential—outlined above, one should also consider what positive values should be embodied in a jury selection system. It is submitted that a good selection system should provide jurors competent to decide the matters entrusted to their collective judgment, and should also strengthen the confidence of the community in the quality of justice rendered by jury trial.¹⁸ A by-product to be considered is the direct involvement of citizens who serve as jurors in the processes of government.

As far as public confidence in the judicial system is concerned, assurance of a jury drawn from a cross section of the community is a most desirable value, aside from the case law which indicates such juries are constitutionally required. This was well expressed by a former Attorney General of the United States:

There come before our courts cases involving every type of person, of every background. None is spared: the rich and the poor, the strong and the weak, the ignorant and the learned; people of all races, religions, and national origins. The law does not discriminate in choosing its litigants. It must not discriminate in choosing their peers.¹⁹

Equally as important is the empanelling of jurors competent to resolve the issues before them. As Senator Sam Ervin of North Carolina has written:

The jury . . . has an awesome responsibility in American justice. It determines the fate of men—their property, their freedom, and sometimes their lives. To work well, indeed to work justice, the jury must perform according to the premises the law lays down.²⁰

To “perform according to the premises the law lays down” of course requires jurors of sufficient intelligence to understand and apply such premises.

¹⁸ An excellent discussion of the values a jury selection system should serve is contained in S. REP. NO. 891, 90th Cong., 1st Sess. (1967). This is the Senate Judiciary Committee's report recommending passage of the Federal Jury Selection and Service Act, 28 U.S.C.A. §§ 1861, *et seq.* (Supp. 1969).

¹⁹ *Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. at 41 (1967) [hereinafter cited as *Judiciary Comm. Hearings*].

²⁰ Ervin, *Jury Reform Needs More Thought*, 53 A.B.A.J. at 133 (1967).

In addition to assuring the selection of juries in a manner calculated to maintain public confidence in the jury system and the selection of competent jurors, a good selection system should also afford to all qualified citizens the opportunity to be considered for jury service. In so doing, it would provide this unique privilege of participation in government to all citizens alike. If an individual considers jury service a burden, he may console himself with the thought that such service is a burden borne equally by his fellow citizens.

III. THE CURRENT MISSISSIPPI JURY SELECTION SYSTEM

With these three values in mind—public confidence, juror competence and opportunity for jury service available to all—examine the current Mississippi jury selection system. The original jury venire is selected by members of the county board of supervisors.²¹ Although the statute directs the supervisors to use the county voter registration books and, in some cases, land assessment rolls as general sources for jurors names,²² the wide discretion vested in the supervisors to choose names from the stated sources makes the Mississippi selection system substantially equivalent to the much-criticized “key man” selection method.²³ The vice of that system is that it limits jurors to persons with whom the key man (who selects or recommends names for the jury venire) is acquainted.²⁴ The current Mississippi statutory scheme inherits that vice in that it allows supervisors to select jurors solely from among their

²¹MISS. CODE ANN. § 1766 (Supp. 1968).

²²MISS. CODE ANN. §§ 1762-03, 1766 (Supp. 1968).

²³See, e.g., the comment of United States District Judge Joseph S. Lord of Pennsylvania: “I do not doubt that the key man method may result in juries which are fairly representative of the community of which they are a part, both geographically and in terms of those infinitely more subtle characteristics vaguely referred to as political, social, ethnic, and economic background. However, the opportunities for unintentional abuse of the system are grave. . . . Even when the key men are so chosen that they do represent all segments of our pluralistic citizenry, there is no inherent guarantee that they themselves will recruit and recommend individual jurors who collectively embody the will of the community. Even more unlikely is it that the system can continue to function with evenhanded representative justice. For every time the community changes, in terms of the political outlook of its members, their economic and social status, their ethnic and cultural composition, and of course their geographical distribution, the perpetuation of the same key men works obvious impropriety. Yet how can court administrators and judges gauge subtle, nuanced changes in societal attitudes and find the appropriate key men to accompany these increasingly fluid developments.” *Judiciary Comm. Hearings* at 75-76.

²⁴A thorough discussion of the operation of the key man system in the federal courts prior to enactment of the Federal Jury Selection and Service Act, 28 U.S.C.A. §§ 1861 *et seq.* (Supp. 1969), appears in *Padgett v. Buxton-Smith Mercantile Co.*, 283 F.2d 597 (10th Cir. 1960).

acquaintances, if in fact it does not dictate that they do so. This system can undermine public confidence in the judicial system in that a litigant might feel that the enmity of a supervisor had resulted in selection of some jurors unfavorable to his claim; or that the friendship of a supervisor with his adversary had done so. This method—in most counties—also defeats the value of affording the opportunity for jury service to all qualified citizens because the acquaintances of any one supervisor in most instances can not possibly extend to all persons qualified for jury service within his district. Furthermore, and most importantly, the acquaintances of many supervisors do not encompass a cross section of the community. Thus a jury constituted from a venire hand-picked by such supervisors is inherently subject to constitutional attack on the cross section argument adopted by the Fifth Circuit in *Labat v. Bennett*. And although the Mississippi and United States Supreme Court decisions have not yet gone so far, it is possible that they will eventually do so. Indeed, the Fourth Circuit has already so extended the cross section argument, ruling in *Witcher v. Peyton* that a selection system by which the jury commissioners chose persons primarily from among individuals known to them personally was unconstitutional. The court said that such sources for juror names “are too limited to provide a jury pool fairly commensurate and representative of the number of each race in the county qualified to act as jurors.”²⁵

As to the third value sought, juror competence, it is submitted that current Mississippi law embodies objective criteria which assures jurors capable of forthrightly handling the heavy responsibility delegated to them. Mississippi Code § 1762 requires that a juror be able to read and write and that he not be a convicted felon, common gambler, or habitual drunkard. There are other qualifications, but these basic ones should assure the selection of jurors of the intelligence and moral character necessary to the rendering of enlightened and just decisions. Since only qualified electors and freeholders resident in the county for one year (in some cases) are eligible for jury service,²⁶ the current jury system assures the selection of jurors who have a stake in the community and who therefore can be expected to have an interest in the quality of justice rendered in its courts.²⁷

²⁵ *Witcher v. Peyton*, 405 F.2d 725, 730 (4th Cir. 1969).

²⁶ MISS. CODE ANN. §§ 1766, 1762-01 *et seq.* (Supp. 1968).

²⁷ In addition to the objective criteria, the current law includes a subjective check exercised by the supervisors at the venire selection stage—supervisors are instructed to select persons of “good intelligence, sound judgment, and fair character.” MISS. CODE ANN. §§ 1762-03, 1766 (Supp. 1968). Since the statute proposed here eliminates the exercise of discretion by supervisors in the selection process, it was thought necessary to include within the statute a section giving the court discretion to excuse persons unfit for jury service even though qualified by objective standards. See text accompanying notes 62-63 *infra*.

In sum, the current Mississippi jury system assures the selection of competent jurors, but cannot in practice be said to provide an equal opportunity for jury service to all qualified citizens. Nor can it be said that the present system is designed to inspire the utmost public confidence in trial by jury. Most significantly, however, the system is subject to attack because of the failure to assure juries drawn from a cross-section of the community.²⁸

IV. PROPOSED STATUTORY REFORM

A. Legislation in General

Remedial legislation should be designed first of all to meet the standards established by the Mississippi and federal courts in the cases involving exclusion from jury service of an ethnic class. Secondly, any legislative change should contemplate the direction of future court decisions in this area, especially as to exclusion of non-ethnic classes such as the daily wage earners excluded in *Labat v. Bennett*. Thirdly, proposed legislation should be designed as nearly as possible to effect the positive jury selection values of public confidence, juror competence, and opportunity for jury service available to all qualified citizens.

1. *Juror Sources*.—Mississippi law prescribes the use of voter registration books and land assessment rolls as the sole sources for names of prospective jurors.²⁹ Land assessment rolls are utilized only pursuant to

²⁸ It should be noted that state exemption, excuse and disqualification provisions can deny the representative jury as effectively as purposeful discrimination or an inadequate selection procedure. See, e.g., *Labat v. Bennett*, 365 F.2d 698 (5th Cir. 1966), *cert. denied*, 386 U.S. 991 (1967), where the Orleans Parish, Louisiana, policy of benign exemption to daily wage earners was held violative of constitutional standards. It is submitted that the current Mississippi law is free from question in this respect. Miss. CODE ANN. § 1764 (1956), provides exemption only where reasonably necessary in the public interest, for example, school teachers, physicians, and government officials are among those exempted. Excuses are available only in cases of illness and hardship, and even in those cases safeguards are present which assure that excuses won't be abused, for example, an excuse for illness is available only upon certificate of a doctor or by oath of the juror in open court. Miss. CODE ANN. § 1764 (1956). A former disqualification under Mississippi law with potential for serious challenge was the exclusion of women from jury service. The Fifth Circuit intimated in *Bass v. Mississippi*, 381 F.2d 692 (5th Cir. 1967), that were it faced with the question of statutory exclusion of women from juries, it would likely rule such statute unconstitutional. A three-judge federal court did reach such a conclusion in *White v. Crook*, 251 F. Supp. 401 (M.D. Ala. 1966). The Mississippi Supreme Court, however, reached an opposite conclusion, ruling Mississippi's statutory exclusion of women from jury service constitutional. *State v. Hall*, 187 So. 2d 861 (Miss. 1966), *followed in* *Pendergraft v. State*, 213 So.2d 560 (Miss. 1968). At any rate the question is now moot since the legislature amended the Code in the 1968 regular session to make women eligible for jury service. Miss. CODE ANN. § 1762-02 (Supp. 1968).

²⁹ Miss. CODE ANN. §§ 1762-03, 1766 (Supp. 1968).

an order by the circuit court judge directing their use.³⁰ The exclusive use of these sources for juror names should meet the standards established by the racial or ethnic class exclusion cases.³¹ Indeed, Congress contemplated that voter lists would be the exclusive source for names of federal jurors under the Jury Selection and Service Act of 1968.³² There is no more comprehensive source for juror names readily available.³³ In those counties which utilize the land assessment rolls, as well as the voter lists, such use should not make the jury selection method constitutionally objectionable.³⁴

³⁰ MISS. CODE ANN. § 1762-01 (Supp. 1968).

³¹ See cases cited in notes 2 & 7 *supra*. See also *Raiford v. Dillon*, 297 F. Supp. 1307 (S.D. Miss. 1969), in which Walthall County's use of voter lists in conjunction with land assessment rolls was sanctioned. The court cited *Grimes v. United States*, 391 F.2d 709, 709-10 (5th Cir.), *cert. denied*, 393 U.S. 825 (1968), to the effect that: "A group of persons who have failed to register to vote has never been considered to constitute a 'cognizable group'" in approving the use of voter lists as a juror source. On the question of land rolls as juror source, the court noted the Fifth Circuit decision in *Roach v. Mauldin* approving the use of tax digests as a juror source in Georgia: "in the absence of racial considerations the use of tax digests, which necessarily exclude nonproperty owners, seems to have been settled as not prima facie unconstitutional . . ." 391 F.2d 907, 908 (5th Cir. 1968). The Mississippi land rolls, like Georgia's tax digests, exclude nonproperty owners from consideration for jury service. See also *United States v. Caci*, 401 F.2d 664 (2d Cir. 1968), *cert. denied*, 394 U.S. 17 (1969), upholding the constitutionality of voter lists as juror source against the contention that such use underrepresents nonvoters in the jury selection process.

³² See 28 U.S.C.A. § 1863(b)(2) (Supp. 1969).

³³ This was the conclusion of the Senate Judiciary Committee in its favorable report of the Federal Jury Selection and Service Act. See S. REP. NO. 891, *Improved Judicial Machinery for the Selection of Federal Juries*, 90th Cong., 1st Sess. 16 (1967). This conclusion was based in part upon the statements of Professor Harry Kalven and Professor-Statistician Hans Zeisel who commented that: "Telephone lists have the disadvantage that they have an economic basis. . . . City directories to the extent that they exist, are a good source, although they have the difficulty that they contain also non-U. S. citizens and therefore have a lot of names which have to be screened out. . . . But the major argument against using city directories is that they are available only in a very few cities. . . . When all is said and done, we believe that the voter registration list is by far the most desirable list as the foundation of the juror selection process. We don't mean necessarily that the voter list should be the only one. If it is found seriously deficient, as it might be in some areas, then by all means it should be supplemented by other lists, but I think from the point of view of the statistician who wants to obtain a representative cross section of the population, the voter list is by far the most desirable source." S. REP. NO. 891, 90th Cong., 1st Sess. 16-17 (1967).

³⁴ See *Raiford v. Dillon*, 297 F. Supp. 1307 (S.D. Miss. 1969), which sanctions use of both sources, and *Roach v. Mauldin*, 391 F.2d 907 (5th Cir. 1968), which finds a source which excludes nonproperty owners acceptable. Of course under the Mississippi statute the exclusion of nonproperty owners by use of land rolls is always diluted by the required use of voter lists.

Assuming the constitutional acceptability of these sources, is it desirable to limit jurors to registered voters and, in some cases, resident freeholders? It is submitted that the answer is yes. It is not unfair to discriminate against persons who meet the juror qualification requisites, but are eliminated from the jury selection process because of failure to register to vote. A person with insufficient public interest to register to vote probably lacks the public interest requisite for a good juror.³⁵ And there is certainly little opportunity for discrimination in the voter registration process since passage of the Voting Rights Act of 1965.³⁶

While the qualification of resident freeholders assures selection of persons who have a stake in the community and should thereby have an interest in the quality of justice rendered in its courts, the reason for the qualification of such persons no longer exists. The Mississippi legislature first took steps to qualify freeholders for jury service after the Fifth Circuit decision in *United States ex rel. Goldsby v. Harpole*,³⁷ which granted a writ of habeas corpus on behalf of a Negro who alleged systematic exclusion of Negroes from jury service in Carroll County, Mississippi.

After the Court's decision in the *Goldsby* case, it became apparent that the State criminal courts were then, of course, helpless to proceed against Negroes in counties where they refused to register to vote. The Mississippi Legislature took steps to remedy this situation. The Laws of 1960, Chapter 502, proposed an amendment to section 264 Mississippi Constitution of 1890. This amendment was ratified by the people of Mississippi and became a part of the Constitution on November 23, 1960. The amendment simply permitted the Legislature to provide for the qualification of grand and petit jurors.

Thereafter, the Legislature amended Mississippi Code Annotated section 1762 (1956) by Laws 1962, Chapter 308, so as to make "[e]ither a qualified elector, or a resident freeholder of

³⁵ "[There is] some relationship between the public interest that would cause a person to register to vote, and jury service." Former Attorney General Ramsey Clark in *Judiciary Comm. Hearings* at 43.

³⁶ 42 U.S.C.A. §§ 1971, 1973-1973p (Supp. 1969). In the four-year period after implementation of the Voting Rights Act of 1965 Negro voter registration in Mississippi rose from 6% to 60%. See *Nixon Plan Perils Voting Rights Act*, The Clarion-Ledger, May 29, 1969, p. 1, col. 7. But cf. *King v. Cook*, 298 F. Supp. 584 (N.D. Miss. 1969), a habeas corpus case in the Federal District Court for the Northern District of Mississippi, which held that as of April, 1966, the voter registration rolls of Quitman County were still "unconstitutionally tainted by the vestiges of a state-sanctioned discriminatory voter registration procedure, the effect of which was to prevent adequate representation of Negroes on Quitman County jury lists." 298 F. Supp. at 588.

³⁷ 263 F.2d 71 (5th Cir.) cert. denied, 361 U.S. 838 (1959).

the county for more than one year * * * a competent juror."

The Legislature amended Mississippi Code Annotated section 1762, *supra*, by Laws 1964, Chapter 327, so as to permit the circuit judge to enter an order in the counties where it became necessary to summon freeholders or because of the failure of Negroes to register.

Thus, in an effort to obtain qualified Negroes for jury service, without regard as to whether or not they were qualified electors, the Mississippi Legislature extended the duty to serve on juries, not only to electors, but also to persons who are resident freeholders.³⁸

But passage of the federal Voting Rights Act of 1965 has completely altered Negro voter registration statistics, so much so in fact that in some cases land rolls may underrepresent Negroes in comparison to the voter lists.³⁹ Moreover, the Mississippi legislature substantially reduced the state requirements for becoming a qualified elector in 1965⁴⁰ and thus further enlarged the number of Negroes available for jury service. In commenting upon the impact of the state voting law change alone, Chief Justice W. N. Ethridge of the Mississippi Supreme Court stated that:

In the present context, the significance of this legislation [the Mississippi voting law changes of 1965] is to increase substantially the number of qualified electors available for jury service, and to minimize the previously important distinction between qualified electors and resident freeholders.⁴¹

That is, with Negroes freely registered to vote, it is no longer necessary to qualify freeholders for jury service in an effort to secure Negro jurors.

It would simplify the Mississippi jury selection system if the legislature repealed the statutory sections qualifying resident freeholders for jury service,⁴² and as demonstrated above, the reason freeholders were qualified at all no longer exists. However, this writer finds no incompat-

³⁸ *Black v. State*, 187 So.2d 815, 817 (Miss. 1966).

³⁹ See, e.g., *Raiford v. Dillon*, 297 F. Supp. 1307 (S.D. Miss. 1969), which reflected that voter registration in Walthall County was 25.1% Negro as compared to Negro representation on the land assessment rolls of 18%.

⁴⁰ Miss. LAWS 1965, First Extra. Sess., S.B. 1501-1510. Chief Justice Ethridge of the Mississippi Supreme Court noted: "The legislature by the enactment of [these] ten statutes, reduced the requirements for becoming a qualified elector, and thus greatly enlarged the number of those available for jury service as qualified electors." Ethridge, *Recent Trends in Criminal Law, and Their Effects Upon Mississippi Practice*, 37 Miss. L.J. 9, 22 (1965).

⁴¹ Ethridge, note 40 *supra* at 22.

⁴² Miss. CODE ANN. §§ 1762-01 to 1762-06 (Supp. 1968).

ibility between service by such persons and the values sought to be implemented by the jury selection system proposed herein. Whether the freeholder qualification is repealed or not, it is the opinion of this writer that the current Mississippi juror sources meet constitutional standards and are satisfactory from the standpoint of achieving the positive jury selection values discussed in Part II. Of course if the land rolls should be used in an attempt to discriminate against Negroes in jury selection, it is not unforeseeable that such use would be declared unconstitutional.⁴³

2. *Venire Selection*.—As discussed above, venire selection in Mississippi is essentially by a “key man” process. This method is suspect because the selection of a cross section jury depends upon how widespread the acquaintances of each supervisor are. While it is likely that a supervisor knows more persons in his district or beat than anyone else, nonetheless in most counties it is an impossibility that a supervisor know substantially all of his constituents. In such cases, the likelihood that he will select a cross section group for the venire is remote.

Under the current status of the law, the supervisors’ selection of a venire so as to represent all definable classes, particularly racial groups, in numbers fairly commensurate with their percentage population in the county should get by.⁴⁴ But the application of a more rigid cross section standard in the future is not unforeseeable,⁴⁵ and as discussed above the

⁴³ It is to be remembered that in *Roach v. Mauldin* the Fifth Circuit approved a juror source which excluded nonproperty owners “in the absence of racial considerations” in the use thereof. 391 F.2d 907, 908 (5th Cir. 1968).

⁴⁴ The cases have required only a rough correlation between the percentage of a particular class represented in the jury selection process and the percentage of that group in the community. See, e.g., *Swain v. Alabama*, 380 U.S. 202 (1965), where the Supreme Court declined to find discrimination although Negroes had been underrepresented in the jury selection process by approximately 10%. The Court said: “We cannot say that purposeful discrimination based on race alone is satisfactorily proved by showing that an identifiable group in a community is underrepresented by as much as 10%.” 380 U.S. at 208-09. See also *United States v. DiTommaso*, 405 F.2d 385 (4th Cir. 1968), which overruled a challenge to the “key man” selection system based on alleged systematic exclusion by sex, age, geography, economic status, and education. But see *Witcher v. Peyton*, 405 F.2d 725 (4th Cir. 1969), discussed at text accompanying note 25 *supra*.

⁴⁵ Witness the tightening standards being developed by the Supreme Court in the area of apportionment, another area in which percentage comparisons are applicable. In its most recent apportionment decision, *Kirkpatrick v. Preisler*, 393 U.S. 948 (1969), the Court stated: “We reject Missouri’s argument that there is a fixed numerical or percentage population variance small enough to be considered *de minimis* and to satisfy without question the ‘as nearly as practicable’ standard. The whole thrust of the ‘as nearly as practicable’ approach is inconsistent with adoption of fixed numerical standards which excuse population variances without regard to the circumstances of each particular case. The extent to which equality may practicably be achieved may differ from State to State and from district to

present system can be improved upon from the standpoint of affording an opportunity for jury service to all qualified persons and strengthening the confidence of the community in the jury system.⁴⁶ These values can be effected and all constitutional questions—present and future—put to rest by the elimination of human discretion in the venire selection. The selection of cross section venires to satisfy current court standards is an onerous task; if more rigid standards are imposed in the future, the selection problem—when undertaken by human discretion alone—approaches the insoluble. Indeed some counties have acknowledged the near impossibility of the situation they face and have abandoned the exercise of discretion in the selection process in favor of the selection method advocated herein, that is, random selection.⁴⁷

It is to be noted that the random selection method is already employed in Mississippi in selection of grand and petit jurors from the venire.⁴⁸ Nor is the use of random selection of the venire a novel idea. Alabama already utilizes such a system,⁴⁹ and the new federal jury act noted above requires that each district court adopt a jury selection plan which assures random venire selection.⁵⁰

Since placing the names of all eligible jurors on a separate piece of paper to be drawn from a jury box (as is done when grand and petit jurors are drawn from the venire in Mississippi) is likely too cumbersome a procedure for venire selection, the legislation proposed here provides for establishing a selection plan in each county involving only the eligible juror lists. A plan might provide, for example, for selection

district. Since 'equal representation for equal numbers of people [is] the fundamental goal for the House of Representatives,' . . . the 'as nearly as practicable' standard requires that the State make a good-faith effort to achieve precise mathematical equality." 37 U.S.L.W. at 4309. Until *Reynolds v. Sims*, 377 U.S. 533 (1964), the Supreme Court had avoided the "political thicket" of apportionment. Less than five years after that decision, in *Kirkpatrick*, it rejected a *de minimis* variance, insisting on a "good-faith effort to achieve precise mathematical equality." It is submitted that a similar development in the jury exclusion area is not unlikely, although preciseness of class representation in jury selection is probably a more difficult problem than preciseness in apportionment.

⁴⁶ Text accompanying notes 24-25 *supra*.

⁴⁷ *E.g.*, Jackson County has implemented a random venire selection plan by which every *n*th name is taken from the voter lists for service on the venire. Interview with Vertis G. Ramsey, Jackson County Circuit Court Clerk, May 29, 1969. Walthall County has implemented a similar plan using both voter lists and land assessment rolls. See *Raiford v. Dillon*, 297 F. Supp. 1307 (S.D. Miss. 1969).

⁴⁸ Miss. CODE ANN. § 1772 (Supp. 1968).

⁴⁹ ALA. CODE tit. 30 § 60 (1958).

⁵⁰ "It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community . . ." 28 U.S.C.A. § 1861 (1966).

of every 12th name on the list for placement on the venire; or, in large counties, for use of a computer to randomly select names. Of course a small county might be able to place the names of all eligible jurors in a hat or box to be randomly drawn out in the venire selection process.

The concept of adoption of a plan for random selection by each county is the concept utilized for each district court in the federal system under the Jury Selection and Service Act of 1968.⁵¹ The use of such a plan concept, rather than a rigid selection method to apply statewide, assures flexibility: Issaquena County has problems different from those of Hinds County, and changing circumstances within a given county may make a change in its venire selection method desirable. The plan concept allows Issaquena and Hinds Counties to utilize the selection method most appropriate for their particular needs and leaves room for the county whose circumstances change to amend its selection plan. A rigid selection method precludes such alternatives.

In sum, random venire selection should preclude successful constitutional challenge: "random selection . . . ensures that jurors will be selected without regard to race, wealth, political affiliation, or any other impermissible criterion."⁵² It assures each qualified citizen of an equal opportunity for jury service—one person's name is as likely to be chosen for the venire as another's. And public confidence in the jury system should be strengthened by adoption of random selection—there can be no question of manipulation when human discretion is eliminated from the selection process.

3. *Grand and Petit Jury Panel Selection.*—Mississippi statute already requires random selection in the drawing of grand and petit jury panels from the venire.⁵³ It is submitted that no change is necessary in this stage of the Mississippi jury selection procedure to meet present or future constitutional challenges, nor is this method of grand and petit jury panel selection inconsistent with the positive jury selection values outlined in this paper.

B. Specifics of the Proposed Legislation⁵⁴

1. *Section 1.*—In surveying the present Mississippi law, it is apparent that the only change in current law necessary to meet constitutional challenges and also fulfill the positive jury selection values noted herein

⁵¹ 28 U.S.C.A. § 1863 (1966). This section sets forth the requisites for a district court's jury selection plan.

⁵² S. REP. NO. 891, 90th Cong., 1st Sess. 16 (1967).

⁵³ MISS. CODE ANN. § 1772 (Supp. 1968).

⁵⁴ The statute proposed here is set out in full in Appendix A following the text of this article.

is implementation of a random selection procedure in drawing the jury venire. It is to be noted that the adoption of random venire selection with its consequent elimination of the "key man" concept from Mississippi jury selection negates the justification for the use of supervisors in the selection process, that is, the assumption that the close identification of supervisors with their constituencies makes them best suited for fulfilling the role of "key man" in venire selection. With random selection, the drawing of jury venires becomes an essentially mechanical process—there is no need for the participation of individuals who have familiarity with the potential jurors. Supervisors are already heavily burdened with responsibilities⁵⁵ without having to preside over a mechanical process for which others are as well qualified. The legislation proposed here therefore would establish a jury commission to remove the jury selection burden from the supervisors. Similar commissions already exist in Mississippi's neighboring states of Alabama, Arkansas, Florida, Georgia, Louisiana and Tennessee.⁵⁶

The proposed commission would consist of three members in each county, to be appointed by the circuit court judge whose jurisdiction encompasses the county. The circuit court clerk would act as clerk for the commission—this would not only provide the commission with necessary clerical assistance, but would also assure access to the county voter registration books.⁵⁷

The creation of the jury commissions should strengthen the confidence of the public in the jury system in that jury selection would be conducted wholly as a function of the judicial branch of government, and not as the function of a quasi-legislative, quasi-executive, quasi-judicial body such as the boards of supervisors. By placing the power to appoint jury commissioners in the circuit court judge, the legislation proposed here clearly positions the jury selection procedure within the auspices of the judicial branch of government, where it rightfully belongs. Under the legislation, the circuit court judge is free to appoint any county resident who meets the qualifications for jury service and is not an elected county official. By eliminating county office holders, the proposed statute further assures that each jury commission will act as an independent arm of the judiciary.

⁵⁵ See generally MISS. CONST. § 170; MISS. CODE ANN. §§ 2870-3019 (1956).

⁵⁶ ALA. CODE tit. 30 § 8 (1958); ARK. STAT. § 39-201 (1962); FLA. STAT. ANN. § 40.09 (1961); GA. CODE ANN. § 59-101 (1965); WEST'S LSA REV. STAT. 13: 3043 (1968); TENN. CODE ANN. § 22-223 (Supp. 1968).

⁵⁷ MISS. CODE ANN. § 3234 (1956), places custody of the voter registration books with the county voter registrar. MISS. CODE ANN. § 3204 (Supp. 1968), specifies that the county voter registrar "shall be the clerk of the circuit court."

Subsection (c) of § 1 outlines a removal procedure for misdoing commissioners. Subsection (d) provides for compensation of the commissioners and reimbursement for expenses incurred.

2. *Section 2.*—As discussed above, utilization of the plan concept is to assure flexibility. Section 2 of the proposed statute requires an annual re-examination of the plan and a written report on its success. This is to guard against complacency on the part of the jury commissioners in blindly continuing with a plan because there are no glaring defects or because no serious challenge has been lodged. It is hoped that such a re-examination would catch and help cure defects which might later pose serious problems.

Note that under present Mississippi jury selection law the jury box is kept secret,⁵⁸ probably to deter jury tampering. Subsection (c) of § 2 continues this practice, allowing access to the jury box only to the jury commission, on court order, and when juries are drawn. Subsection (d) provides a safety valve in case the jury commission underestimates a court's juror needs for a particular year. Consistent with the current law maintaining the secrecy of the jury box, subsection (e) provides that the commission's jury selection records shall be kept secret until the jury box for that particular year is empty. Of course access to such records could allow one to determine what names would be placed on the venire.

3. *Section 3.*—Subsection (a) of § 3 merely defines the objective of the jury selection plan and sets out the source lists from which jurors are to be chosen. Sentence 2 of the subsection should be eliminated if the legislature determines that use of land assessment rolls as a juror source should be discontinued.⁵⁹

The proposed statute as drawn eliminates the drawing for jury service of an approximately equal number of jurors from each supervisor's district. This practice underrepresents populous districts while overrepresenting the district with a relatively smaller population.⁶⁰ Obviously the practice denies juries fairly representative of a cross section of the county, as opposed to juries representative of a cross section of a par-

⁵⁸ MISS. CODE ANN. § 1766 (Supp. 1968): "The clerk of the circuit court shall put the names from each supervisor's district in a separate box or compartment, kept for the purpose, which shall be locked and kept closed and sealed, except when juries are drawn"

⁵⁹ See text accompanying notes 37-43 *supra* for a discussion of the propriety of retaining the land assessment rolls as a source for juror names. If the legislature decides to eliminate the land rolls as a juror source, repeal of Miss. CODE ANN. §§ 1762-01 to 1762-06 (Supp. 1968), should be added to § 5 of the proposed statute.

⁶⁰ See Lanham, *Jury Duty in Beat 3: A Five-to-One Chance*, The Mississippi Press Register, Feb. 18, 1968, p. 1, col. 1.

ticular district or beat. Likewise, this practice negates an equal opportunity for jury service among qualified citizens in the county, although it could provide equal opportunity for service as among the qualified citizens of a particular beat. It is submitted that the appropriate governmental unit to consider in jury selection is the county, and not the supervisor's district as is the case under present law. However, should the legislature desire to continue the present practice a simple sentence appended to § 3 (a) of the proposed statute could effect that result. The sentence might read: "The plan shall assure the selection of veniremen as equally as possible from each supervisor's district."⁶¹

Subsection (b) of § 3 requires the jury commission to set out a detailed explanation of its plan so that the circuit court judge will be able to evaluate the plan and ascertain whether it assures the random selection of jurors. Subsection (c) sets out the procedure by which a proposed plan is submitted to a circuit court judge for his approval. Note that the jury commission is free to merely resubmit the already existent plan, but the statute nonetheless requires a submission of the plan to the judge to help guard against an unthinking adoption of the old plan by the commission. Subsection (d) sets up a modification procedure in case the judge or commission deems revision of the plan necessary.

4. *Section 4.*—Section 4 is an almost verbatim copying of subsections (2) and (5) of § 1866(c) of the Federal Jury Selection and Service Act of 1968.⁶² The section places discretion in the court to discharge anyone summoned for jury service whom the judge determines unfit for service because of partiality, threat to the secrecy of the proceedings, or other

⁶¹ The random selection of grand and petit jurors under Code § 1772, as it would be amended by the proposed statute, is without regard to supervisors' districts. Thus merely adding the sentence suggested in the text to § 3(a) would result in a change in the manner in which approximately equal representation from each beat is effected under present law. But this change in manner should not cause a change in ultimate effect. Random selection by definition implies that the percentage composition of a sample will correspond to the percentage composition of the larger unit from which it is drawn. That is, if Beat 1 veniremen outnumber those from Beat 2 by two-to-one, a randomly selected group drawn therefrom should contain twice as many persons from Beat 1 as from Beat 2. Thus, although drawing grand and petit jurors equally from each beat is not required, a random selection of such jurors from a venire which equally represents all beats should result in approximately equal numbers of jurors from each beat. Alternatively, the method for grand and petit juror selection now utilized could be continued, that is, names of veniremen from each beat could be kept apart and the drawing of grand and petit jurors accomplished in essentially the same manner as now provided by § 1772. Of course this alternative would require amendment of § 1772 in a manner different from that proposed here.

⁶² 28 U.S.C.A. § 1866(c)(2) & (5) (Supp. 1969).

similar likelihood that such person would impugn the integrity of jury deliberations. This provision was thought necessary because the elimination of human discretion in venire selection also eliminates an important mechanism by which undesirable persons may be weeded out of the jury selection process under present law. This mechanism is contained in Code §§ 1766 and 1762-03 which call for the supervisors to select as veniremen "qualified persons of good intelligence, sound judgment, and fair character." The discretion vested in the supervisors by this provision operates as a subjective check against the objective criteria otherwise imposed by statute. While these objective standards designed to assure juror competence are adequate,⁶³ nonetheless it is submitted that subjective criteria are also necessary as a protection against those who meet objective standards but are otherwise unfit for jury service. Proposed § 4, thus, is intended as a substitute for the subjective check now embodied in the "good intelligence, sound judgment, and fair character" requirement. As noted, the discretion to dismiss is vested in the court and is to be exercised after an individual has been summoned for jury service.

5. *Other Sections.*—Section 5 includes the amendments necessary to make the current Mississippi Code consistent with the changes effected by the statute proposed here. It also lists those sections which are superseded by the proposed legislation and should therefore be repealed.

Section 6 proposes an effective date of November 1, 1971, because that is the first month of a general election in Mississippi after the next regular session of the state legislature.

V. CONCLUSION

Jury selection in Mississippi is at a critical juncture. Already solutions for the problems faced are being worked out on an ad hoc basis—some counties are devising local selection procedures designed to overcome constitutional challenges;⁶⁴ other counties find themselves under injunction to do so.⁶⁵ Meanwhile criminal convictions in many areas of the state remain suspect, and the county officials in such areas subject to successful suits enjoining their selection procedures. Such suits are

⁶³ Text accompanying notes 26-27 *supra*.

⁶⁴ *E.g.*, Jackson and Walthall Counties. *See* note 47 *supra*.

⁶⁵ *See e.g.*, *Love v. McGee*, 297 F. Supp. 1314 (S.D. Miss. 1969); *Johnson v. Gibbs*, Civil Action No. WC69-6S (N.D. Miss. Jan. 25, 1969).

costly and can result in burdensome compliance requirements.⁶⁶ When criminal convictions are reversed, the state faces the prospect of costly retrial and possible failure to regain the conviction on the second go-around.

The magnitude of this problem demands more than ad hoc attention which at best patches here and there to meet problems posed today with little consideration given to the serious questions which may arise tomorrow. The legislature should thoroughly study the jury selection area and lay these problems to rest once and for all—at least as best as can be done by legislation. It is submitted that the statute proposed here adequately meets the challenges now facing our jury selection laws and also foresees and satisfactorily answers questions which may arise in the future. In doing so, the proposed statute is designed to implement the positive values of fostering public confidence in the system of trial by jury, making the opportunity for jury service equally available to all qualified citizens, and assuring that jurors are chosen who are competent to render just and honest decisions.

APPENDIX A

AN ACT TO AMEND STATE JURY SELECTION PROCEDURE BY REQUIRING RANDOM SELECTION OF THE JURY VENIRE UNDER SUPERVISION OF A COUNTY JURY COMMISSION

Be it enacted by the Legislature of the State of Mississippi:

§ 1. *Establishment of Jury Commission*

- (a) Within 30 days of the State's general election, each newly-elected or re-elected circuit court judge shall appoint a three-member jury commission for each county within his district. In those districts which have two or more circuit court judges, the judge who has been for the longest time continuously a

⁶⁶ See, e.g., *Johnson v. Gibbs*, Civil Action No. WC69-6S (N.D. Miss. Jan. 25, 1969), which requires Grenada County officials to file a written report with the federal district court after every term of court giving the names of persons by race and sex who are found by the presiding judge to be disqualified for jury service, and who serve on the grand jury, petit jury, tales jury, or on a special venire. The name, address, race, sex, reason for disqualification, and disqualifying facts must also be submitted as to each person found by the board of supervisors or presiding judge to be disqualified for jury service. County officials are further required to maintain available for public inspection other records, such as the minutes of the Grenada County Circuit Court relevant to jury selection, names of persons excused from jury service, and copies of venire facias delivered to the sheriff together with names of persons appearing thereon not subpoenaed for jury service.

judge of that district, or if the judges are equal in time of service, then the judge who has been engaged for the longest time continuously in the practice of law in this State, shall appoint the members of the jury commissions. Appointment to the commission is for a term coterminous with that of the appointing judge. In case of vacancy, the circuit court judge shall appoint a person to serve the unexpired term of a departed member.

- (b) To be eligible for commission membership, a person must meet the qualifications for jury service in this State and reside in the county for which he is appointed. A commission member is eligible for reappointment. An elected county official is not eligible for membership.
- (c) A circuit court judge may remove a commission member for failure to perform duties, negligence, corruption in office, or other good cause. The judge shall give at least five days notice to the affected member before removal. Removal may be effected in open court or in the judge's chambers in the discretion of the judge.
- (d) A commission member is entitled to compensation of ___ dollars a day for days on which he necessarily performs jury commission duties. He is entitled to reimbursement for travel, subsistence, and other necessary expenses of commission membership. To receive compensation and reimbursement, a commission member must submit an itemized account of expenses and a schedule of days for which compensation is due to the county board of supervisors. The board of supervisors shall pay a member the amounts stated from the county fund, except if the amounts stated are unreasonable, the board of supervisors shall pay a member only reasonable compensation and reimbursement.
- (e) The county circuit court clerk shall serve as clerk of the jury commission. His duties include providing clerical assistance to the commission and reasonable access to the county voter registration and poll books. The board of supervisors shall pay the circuit clerk ___ dollars a day from the county fund for each deputy clerk necessarily employed in rendering clerical assistance to the jury commission.
- (f) The jury commission shall designate one of its members to serve as chairman. To be effective, actions of the commission must be approved by at least two members.

§ 2. *Duties of the Jury Commission*

- (a) The jury commission shall establish a plan for random selection of a jury venire in accord with the specifications of § 3.
- (b) The jury commission shall meet annually in April and re-examine the venire selection plan. The commission shall submit to the circuit court judge a written report on the re-examination, which includes comment on the success of the plan in achieving random selection and cross section juries.
- (c) At the April meeting the jury commission shall compile a jury venire list which contains enough names to fulfill the county juror requirement for at least one year. The clerk shall write the name of each venireman on a separate slip of paper, and place the slips in a box. The clerk shall maintain custody of the box and keep it locked, except the clerk shall open the box at the request of the jury commission, upon court order, and when juries are drawn.
- (d) If it appears that the jury venire list will not provide enough jurors during the year, the jury commission may add names to the venire list. The jury commission shall add names to the venire list if the circuit court judge requests additional veniremen. The clerk shall write the additional names on separate slips of paper, and place the slips in the jury box.
- (e) The clerk shall keep records of the commission's annual venire selection process. These records shall remain secret until the jury box for that year is empty, except the clerk shall allow a party challenging the selection process reasonable access to the records for inspection, copying, or reproduction. When the jury box for a year is empty, the clerk shall make the selection process records for that year available for public inspection.

§ 3. *Establishment of Jury Venire Selection Plan*

- (a) A jury venire selection plan shall reasonably ensure the random naming of veniremen from among those persons on the county voter registration books. A selection plan shall include names from the county land assessment rolls if an order under § 1762-02 (which qualifies resident freeholders who are not electors for jury service) is in effect. The plan may consist of drawing names from a box which contains the names of all eligible jurors; selection of names from an eligible juror list

by use of a multiple; designation of veniremen by computer; or other processes which assure reasonably random selection.

- (b) The venire selection plan shall include detailed explanation of the procedures of the selection process. It shall provide for periodic emptying and refilling of the jury box and for the addition of names if necessary to meet jury requirements. The box must be emptied at least once within a two-year period.
- (c) Within sixty (60) days of appointment, a jury commission shall submit in writing a copy of a proposed jury venire selection plan to the circuit court judge. If the judge finds that the plan does not provide for reasonably random selection, he shall state to the commission the particulars in which the plan fails. Within a reasonable time after a notice of disapproval, the commission shall submit an alternate plan which corrects defects noted by the judge. A plan or alternate plan is effective when approved by the circuit court judge, and remains in force until superseded by approval of a later plan.
- (d) The jury commission may propose modifications of the venire selection plan by submission of a written proposal to the circuit court judge. The jury commission shall modify the selection plan if the circuit court judge directs modification, or if the commission determines that a plan does not ensure reasonably random selection. A modification is effective when approved by the circuit court judge.

§ 4. *Exclusion of Persons Unfit for Service*

Any person summoned for jury service may be excluded by the court on the ground that such person may be unable to render impartial jury service or that his service as a juror would be likely to disrupt the proceedings or that service of such person as a juror would be likely to threaten the secrecy of the proceedings, or otherwise adversely affect the integrity of jury deliberations.

§ 5. *Amendment and Repeal*

- (a) The following laws and parts of laws are repealed: Miss. Code Ann. §§1762-03, 1766 (Supp. 1968); Miss. Code Ann. §§ 1767, 1768, 1771 (1956).
- (b) Miss. Code Ann. § 1770 (1956) is amended by striking out words "board of supervisors" and substituting the words "jury commission."

- (c) Miss. Code Ann. § 1772 (Supp. 1968) is amended by striking out of the second and third lines the words "the five (5) small boxes enclosed in"; and by striking out of the sixth and seventh lines the words "drawing the same number of slips from each and every one of the five (5) small boxes if practicable".
- (d) Miss. Code Ann. § 1778 (1956) is amended:
 - (1) by striking out of the first line the words "board of supervisors" and substituting the words "jury commission";
 - (2) by striking out of the second and third lines the words "if the clerk of the board fail to duly certify the jury list to the clerk of the circuit court;";
 - (3) by striking out of the third line the word "latter" and substituting the word "circuit";
 - (4) by striking out of the nineteenth line the words "board of supervisors" and substituting the words "jury commission"; and
 - (5) by striking out of the nineteenth line the word "board" and substituting the word "commission".
- (e) Miss. Code Ann. § 1779 (1956) is amended by striking out of the fifth line the words "name from each supervisor's district shall be placed in a separate" and substituting the words "names shall be placed in a"; and by striking out of the seventh, eighth and ninth lines the words "and said names shall be drawn from each box in regular order until the number designated is drawn".

§ 6. *Effective Date*

This Act shall become effective after November 1, 1971.

STUDENT COMMENTS

THE RIGHT OF PUBLIC EMPLOYEES TO UNIONIZE

I. INTRODUCTION

In 1935 the U. S. Congress took a giant step forward in the area of labor law by enacting the "constitution" of the laboring class—The National Labor Relations Act.¹ Departing from the old philosophy that law should play no role in labor-management relations, the NLRA made lawful the rights of labor to organize and to bargain collectively. However, these rights were guaranteed only to laborers in the private sector; the Act specifically exempted from coverage the United States government and all states and political subdivisions thereof.²

As a result of Congress' unwillingness to include government employees under the umbrella of the National Labor Relations Act, unionization in the public sector began at a slow pace. Nonetheless, unions have more than made up for lost time in recent years. According to a current article, the three most prominent public employee unions—American Federation of State, County, and Municipal Employees (AFSCME), American Federation of Government Employees (AFGE), and American Federation of Teachers (AFT)—are the fastest growing unions in the country today.³ To illustrate, from 1964 to 1966 union membership increased on the average of six per cent. At the same time, AFSCME increased twenty per cent; AFGE increased forty-two per cent; and AFT increased fourteen per cent.

This high rate of increase in public employee unionization is in part attributable to the parallel increase in the number of government employees. For example, state and local government employment has the fastest growth rate in the country at the present time. Between 1962 and 1968 employment in state and local government mushroomed from 6½ million employees to 9½ million.⁴ According to former Secretary of Labor Willard Wirtz, in 1966 one out of every six employees in the United States was on a public payroll.⁵ And it is estimated that in the year 2000

¹ National Labor Relations Act, 29 U.S.C. § 151 (1935).

² *Id.* § 152(2).

³ Weisenfeld, *Public Employees Are Still Second Class Citizens*, 20 LAB. L.J. 138, 139 (1969).

⁴ *Id.* at 138.

⁵ Address by Willard Wirtz, AFSCME Convention, April 27, 1966. Secretary Wirtz said there were 10½ million public employees as of April, 1966. Of this number, three-fourths were local employees, and one-half of these were in education.

one out of every four employees in the U.S. will be a public employee.⁶

Whether the unionization of public employees will continue its parallel increase with that of public employment remains to be seen. Doubtless, the many social and economic problems recently generated by public employee union activities, especially the strike, will curtail the unionization to some extent. Just how much curtailment will result is difficult to forecast.

One thing is certain. If unionization in the public sector is to continue, new legal theories, as well as old, will be advanced in order to provide the courts with legal bases upon which they can bottom their decisions. In order to determine what these theories will be, it is necessary to closely examine the case law and legislation in the entire area of public employee unionization.

For analytical purposes the following examination of the subject divides public employees into two groups: first, local government employees; and second, federal government employees.

II. LOCAL GOVERNMENT EMPLOYEES

For purposes of this discussion local government employees include those persons employed by a state, county, or municipality, or a subdivision thereof. In other words, all government employees not employed in the federal sector will be considered local government employees.

In the following analysis of the legal theories which local government employees will propose in order to obtain the right to unionize, attention is devoted to three particular areas: first, attention is focused on those local governments which have specific *legislation* permitting unionization by public employees; second, there is a discussion of those *state court cases* which have relied on grounds other than specific legislation to grant these employees the right to unionize; and third, there is a treatment of *federal court cases* which have granted public employees the right to unionize.

A. Theories Based on Local Government Legislation

At the present time several states have statutes specifically granting public employees the right to unionize.⁷ These states have decided to experiment to determine whether principles and practices of collective bargaining can be transferred from the private to the public sector.

⁶ Smith and Clark, *Reappraisal of the Role of the State in Shaping Labor Relations Law*; 1965 WIS. L. REV. 411, 422 (1965).

⁷ Anderson, *The United States Experience in Collective Bargaining in Public Employment—Part I*, 13 PRAC. LAW. 14 (1967).

Although these states' statutes are similar in many respects, they frequently vary with respect to the particular groups of public employees covered by the legislation.

For example, Wisconsin, Connecticut, Michigan, Rhode Island, and Massachusetts have adopted statutes granting *municipal* employees the right to unionize.⁸ In addition, Rhode Island and Minnesota grant this right to *state* employees.⁹ California, Oregon, Florida, and Washington have enacted legislation dealing with *school board-teacher* relationships.¹⁰ Finally, special provisions for determination of grievances and disputes over the terms of employment of *firemen* exist in California, Illinois, Iowa, and Rhode Island.¹¹

In these states which have statutes providing certain groups of public employees the right to unionize, the employees who are covered are obviously in a most favorable situation. The covered employees should experience little difficulty in exerting their legal right to join a union. But what about those public employees who are not covered by the legislation? Can they unionize, too?

The answer to the above question is yet to be definitely decided. Presumably, one reason the question has arisen so infrequently is that the unions now are busier trying to organize those employees already covered under unionization statutes. If the unions should decide to undertake organization of those employees omitted from coverage, however, one legal theory which doubtless will be proffered is the constitutional argument of equal protection.

The equal protection argument could be made as follows. The courts have recognized and affirmed that a public employee has a right to join a union. This right is a constitutional right guaranteed by the right of association of the first amendment of the U.S. Constitution, made operable on the states by the due process clause of the fourteenth amendment. Since the right is a constitutional one, it is guaranteed to

⁸ WIS. STAT. ANN. §111.70 (Supp. 1969); CONN. GEN. STAT. §7-468 (1966); 12A MICH. STAT. ANN. §17.455 (1968); R.I. GEN. LAWS ANN. §36-11-1 (Supp. 1967); MASS. GEN. LAWS ANN. ch. 149, §178H (Supp. 1968).

⁹ R.I. GEN. LAWS ANN. §36-11-1 (Supp. 1967); MINN. STAT. ANN. §179.50 (1966).

¹⁰ CAL. GOV'T CODE §3500 *et seq.* (West (1966)); CAL. EDUC. CODE §13080 *et seq.* (West 1966); ORE. REV. STAT. §342.450 *et seq.* (1968); FLA. STAT. ANN. §839.221 (1965); WASH. REV. CODE §28.72.010 *et seq.* (Supp. 1967).

The National Education Association plans to propose a *federal* law requiring school boards to bargain with unions and give teachers a right to strike. Wall Street Journal, April 15, 1969, at 1, Col. 5.

¹¹ CAL. LAB. CODE §1960 *et seq.* (West Supp. 1968); ILL. ANN. STAT. ch. 24, §10-3-8 (1962); IOWA CODE ANN. §90.15 *et seq.* (Supp. 1969); R.I. GEN. LAWS ANN. §28-9.1 *et seq.* (1956).

all persons employed in the public sector. Although a state may reassert this right to its public employees, no state can deny this right to any public employee regardless of his particular occupation in the public sector. The state cannot take away this right because a state statute is impotent to abnegate an individual right guaranteed by the Federal Constitution. Thus, to permit a state to pass statutory legislation granting only certain groups of public employees the right to organize would be to deny the omitted employees equal protection of the law, another constitutional right guaranteed citizens of the states by the fourteenth amendment.

In rebuttal of this equal protection theory, the state could contend the statute is merely a lawful exercise of its well-settled power to classify persons in a reasonable manner for statutory purposes.¹² In support of this contention the state could argue that certain justifiable distinctions exist between those public employees covered and those omitted; therefore, the classification is not unreasonable but duly constitutional.¹³

From the foregoing it is obvious that proper theoretical arguments can be made for, and against, granting the right to organize to public employees omitted from coverage by state statute. Which argument the courts will take in the future is uncertain. The most that can be said with any assurance is that in making their decision the courts will look to factors such as the purpose of the classification of employees, the reasonableness of the classification, and the justifiable distinctions between the type of work of those employees who are covered and those who are not.

B. Theories Adopted by Local Government Judiciary

In addition to those states whose legislatures have taken the initiative and granted the right to unionize to public employees, the judicially active courts of other states have wrestled with the issue and done likewise.

One example of this judicial activism is *Chicago Division of Illinois*

¹² 16 AM. JUR.2d *Constitutional Law* §494 (1964).

¹³ *Minneapolis Federation of Teachers Local 59 v. Peter Obermeyer*, 275 Minn. 46, 144 NW2d 789 (1966). In this case the Minnesota Supreme Court held that provisions of a state law, which conferred upon public employees the right to join a union but excepted therefrom public school teachers, are not unconstitutional as an unreasonable and arbitrary classification denying teachers equal protection of the law under the federal and state constitutions. Furthermore, the court said designation of teachers as a class apart from other employees was not subject to constitutional attack in view of the state legislature's historical recognition of a sufficient distinction between teachers and other public employees.

Education Association v. Board of Education of the City of Chicago.¹⁴

In this case the Board of Education of Chicago had entered into "memoranda of Understanding" with both the Chicago Teacher Union and the Chicago Division of the Illinois Education Association; these memoranda prescribed procedures for the resolution of grievances and professional problems. In September of 1965, facing a strike threat by the union, the Board agreed to hold an election to determine whether the Teachers Union or the Education Association would be the exclusive bargaining unit. The Education Association then filed suit to block implementation of the Board's decision to hold the elections. The trial court held that the Board resolution authorizing the teachers employed in the system to vote to select a sole bargaining agent was consistent with the Illinois School Code. The Education Association appealed the trial court's decision.

The question before the Illinois appellate court was whether the Board of Education could enter into a collective bargaining agreement with the sole bargaining agent selected by its teachers, in the absence of express legislative authority granting the Board such power. The Board was legislatively authorized to do all things "necessary and proper" for the operation of the schools. The union contended that collective bargaining was a "proper" function of the Board and not contrary to public policy. Another crucial issue was whether the Board should exercise its discretion on this subject or whether it should leave to the legislature the many policy questions presented by the question of whether collective bargaining should be imported into the public sector. After exhaustively reviewing national authorities, the court held that the Board's exercise of its discretion was a "proper" function of the Board. Also, the court concluded that no express legislative authority to the Board was necessary, the agreement made was not contrary to public policy, and there was no improper delegation of legislative authority.

A second legal argument which state courts have used as a basis for granting public employees the right to unionize is based on state right to work laws. In *Beverly v. City of Dallas*¹⁵ the Court of Civil Appeals of Texas held invalid a city ordinance forbidding public employees to join a union. The firemen who attacked the ordinance based their claim on the Texas Right to Work Law of 1947. The court concluded that the passage of this law resulted in a very definite change in the situation of public employees in Texas because up to that time the Texas courts had upheld the validity of ordinances similar to the one in question.

¹⁴ 76 Ill. App.2d 456, 222 N.E.2d 243 (1966).

¹⁵ 292 S.W.2d 173 (Tex. Civ. App. 1956).

At first blush this decision seems to strike a telling blow for public employee labor unions in Texas, but a closer perusal of the case indicates otherwise. In its opinion the court pointed out that the Right to Work Law permits union membership by public employees, but the court affirmed the sections of the law prohibiting collective bargaining or striking by the unions. It would appear that the degree of influence which public employees could exert on their employer when the right to bargain collectively is denied is less than dramatic.

In another case involving a State Right to Work Law, the Supreme Court of Arkansas held that a constitutional amendment in the form of a right to work law which says no person shall be denied employment because of membership in a labor union applies to public employees.¹⁶ Further, the court held that a statute requiring persons be denied employment as policemen because of union membership was repugnant to the right to work law and unconstitutional. The court chose to include public employees under the protection of the law although the statutory language did not specifically include them.

In the Arkansas case, too, however, the court's decision to permit public employee unionization did not include the right of the union to strike or bargain collectively, thereby restricting the ability of the unions to exert economic pressure on the employees.

In addition to the *state* courts which have granted public employees the right to unionize, at least two *federal* courts of appeal have done likewise. In two very recent cases both the Seventh Circuit Court of Appeals and the Eighth Circuit Court of Appeals upheld the right of public employees to join unions.

The Seventh Circuit reached this conclusion in *McLaughlin v. Tilendis*.¹⁷ In this case an Illinois school board dismissed one teacher and refused to hire a second because of their association with a union. The court held the teachers were deprived of their constitutional rights of association under the first and fourteenth amendments of the U. S. Constitution in violation of the Civil Rights Act of 1891. According to the court, the first amendment confers the right to join a labor union, and the Civil Rights Act of 1871 gives employees a remedy if their contracts were not renewed because of the exercise of this right, even though the teachers did not have tenure.

It is interesting to note the argument of the defendant school board in *Tilendis* to the effect that it was immune from suit because of the

¹⁶ Potts v. Hay, 229 Ark. 830, 318 S.W.2d 826 (1958). *Accord*, Norwalk Teachers Association v. Board of Education, 138 Conn. 269, 83 A.2d 482, 485. *See* 31 A.L.R.2d 1133.

¹⁷ 398 F.2d 287 (7th Cir. 1968).

Illinois Tort Immunity Act.¹⁸ The court made short shift of this contention by holding the supremacy clause of the U.S. Constitution requires that a state statute cannot protect a defendant from a cause of action based on a federal statute.

In a similar case, *American Federation of State, County, and Municipal Employees v. Woodward*, the Eighth Circuit Court of Appeals also relied on the first and fourteenth amendments and the Civil Rights Act of 1871¹⁹ to grant the public employees relief.²⁰ In this case a municipal employer discharged two municipal street department employees because they joined a union. The primary issue in the case was whether the Civil Rights Act provided a proper remedy of injunctive relief and damages to the discharged employees. In deciding the issue the court relied upon the Nebraska Constitution which provides: "No person shall be denied employment because of membership in or affiliation with . . . a labor organization."²¹ The court concluded that the Nebraska Constitution was not limited by its terms to private employees; then, public employees were included by this provision.

A noteworthy contention of the defendant employer in the case was that the plaintiff employees had not exhausted the state judicial and administrative remedies prior to seeking relief in the U.S. District Court in Nebraska. The court skirted this issue by concluding that the suggested remedies were not shown to be adequate. The court reached this conclusion for two reasons: first, the defendant employer did not contend that Nebraska state courts had or would exercise jurisdiction; second, the defendant employer did not challenge the plaintiff's statement that "no Nebraska court or agency has ever ordered reinstatement and compensation of public employees discharged for joining a union"

The importance of *Woodward* and *Tilendis* is obvious. These cases could be the beginning of a larger trend by all of the federal courts to entertain jurisdiction of public employee suits demanding the right to unionize. In those states in which employees have had little or no success in state court, the employees can now file suit in federal district court and cite as precedent for jurisdictional grounds the rationale of

¹⁸ The Illinois Tort Immunity Act is found in Ill. Rev. Stat. ch. 85 §2-201 (1966).

¹⁹ Section 1, Civil Rights Act of 1871, 42 U.S.C. §1983, provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

²⁰ 406 F.2d 137 (8th Cir. 1969).

²¹ NEB. CONST. art. 4, §13. *Accord*, NEB. REISSUE REVISED STATUTES §48-217 (Cum. Supp. 1965).

Woodward and *Tilendis*. In many instances this approach might enable the employers to overcome local judicial bias against public employee unionization.

Now that we have looked at the legal theories in those states which have granted local government public employees the right to unionize, it is important to view the states which deny the right of unionization. Such a discussion includes a look at those states whose legislatures have specifically denied the right of public employees to unionize. Also, it is important to note those states whose courts have prevented these employees from unionizing.

At present at least four states have legislation expressly denying organization of public employees.²² The legislation of the four states differs in the scope of coverage. For example, Georgia prohibits only policemen from unionizing. In Alabama any public employee, meaning, "Any person whose compensation is derived in whole or in part from the state, or any agency, board, bureau, commission or institution thereof," is prohibited from joining a labor union.

The constitutionality of Alabama law was challenged in federal district court in *Government and Civic Employee Organizing Committee, CIO v. Windsor*.²³ The district court chose to withhold the exercise of jurisdiction under the doctrine of abstention. On its review of the district court's action, the United States Supreme Court held that the federal court should have retained jurisdiction until a definitive determination of local law questions was obtained from the state court.²⁴

The decision of the Alabama federal district court in *Windsor* is highly questionable, especially in light of the more recent decisions on the subject by the federal circuit courts of appeal in *Tilendis* and *Woodward*. It appears that Alabama public employees choosing to contest the constitutionality of the law preventing unionization would be on much firmer footing in light of these recent federal decisions. In Seventh and Eighth Circuits the worst that could happen would be the Fifth Circuit's affirming the Alabama federal district court. In this event, there would be a conflict among the Fifth, Seventh, and Eighth Circuits and thus ground for an appeal to the U.S. Supreme Court.

We now look at one state whose *judiciary* has ruled that certain public employees do not have a right to unionize. The Missouri Supreme Court in 1947 in *King v. Prest* said that the police officers of St. Louis,

²² The four states are as follows: Alabama: ALA. CODE tit. 55 §317 (2) (1958); Georgia: GA. CODE ANN. §§54-909, 54-9923 (1961); North Carolina: N.C. GEN. STAT. §§95-97; Virginia: VA. CODE §§40.65-40.67 (1950).

²³ 116 F.Supp. 354 (1953).

²⁴ 353 U.S. 364, (1957).

Missouri, were rightfully prohibited from unionizing by a rule adopted by the Board of Police Commissioners of the city.²⁵ Several St. Louis policemen attacked the rule as unconstitutional. In deciding the question, the court relied heavily on its right to take judicial notice of matters of common knowledge. Although the employees' petition clearly stated that the union would not strike or attempt to bargain collectively, the court chose to refuse to assume that these powers commonly exercised by labor unions would not be exercised by the policemen's union. The court held the rule prohibiting unionization was reasonable as applied to the policemen.

Although the *King* case was decided more than 20 years ago, it still appears to be the law in Missouri. It should be noted, however, that in some states whose courts once held that public employees could not unionize, there has been a reversal of position on this point. For example, in 1917 an Illinois court held the public employees of Chicago could not unionize, whereas in 1966 the opposite result was reached.²⁶

III. FEDERAL GOVERNMENT EMPLOYEES

At this time we turn from our previous consideration of unionization of local government public employees to a brief consideration of those public employees working in the federal sector. These employees will be referred to as federal government public employees and include all persons employed by the federal government.

Federal government public employees are granted the right to unionize by Executive Order 10988, issued by President John F. Kennedy on January 17, 1962.²⁷ At the time of the study of the federal labor situation ordered by Kennedy, 22 of 57 federal agencies studied had no labor relations policy at all, and only 11 had a bare minimum.²⁸ As a result of Executive Order 10988, however, many of the agencies theretofore having no labor policy or unionization within the rank experienced swift changes in this respect.

Under Order 10988 federal employees are granted the right to form, join, and assist any employee organization or to refrain from such activity. Beyond this right, however, there is alleged to be little that these

²⁵ 357 Mo. 68, 206 S.W.2d 547 (1947). *Accord*, *City of Jackson v. McCleod*, 199 Miss. 676, 24 So.2d 319 (1946).

²⁶ *People ex rel Fursman v. City of Chicago*, 278 Ill. 318, 116 N.E. 158 (1917) and *Chicago Division of Illinois Education Association v. Board of Education of City of Chicago*, 76 Ill. App.2d 456, 222 N.E.2d 243 (1966).

²⁷ Exec. Order No. 10988, 27 F.R. 551, 5 U.S.C. § 631, 5 U.S.C.A. § 7301 (1962).

²⁸ Craven, *Bargaining in the Federal Sector*, 19 LAB. L.J. 569 (1968).

employee unions can do. Supposedly, there is no right to bargain for wages, seniority, pensions, or health and welfare benefits.²⁹ Nevertheless, the effect of Order 10988 has been to rapidly increase the unionization of federal agencies and departments.³⁰

IV. CONCLUSION

Public employee unionization in this country is increasing dramatically. The high rate of increase is partly attributable to the spiraling growth in the number of government employees in both the federal and local sectors. Whether this growth trend continues will depend to some extent on the legal theories which public employees make to the state and federal courts in which unionization suits are filed.

Which of these theories advocating the right of public employees to unionize is available for argument depends to a great extent on whether the employee works in the local government sector or the federal government sector.

Some local governments, usually the states, have enacted specific legislation granting certain groups of public employees the right to unionize. In a few states the local judiciary has relied on grounds other than specific legislation to grant local government employees the right to unionize. Finally, two circuit courts of appeal have entered the state arena and granted unionization rights to local government employees.

In four states the state legislatures have passed legislation specifically denying public employees the right to unionize. The only recourse of the employees seeking the right to unionize is to attack the constitutionality of this legislation. Also, some state courts have denied these employees unionization rights even though there is no specific state legislation to this effect.

Federal government employees were granted the right to organize by Executive Order 10988. As a result of this order unionization activities among federal employees are increasing, although there is concern on the part of some because of the limitations of the approved activities.

Clifford Thompson

²⁹ ABA LABOR RELATIONS SECTION 78 (1967).

³⁰ Anderson, *The United States Experience in Collective Bargaining in Public Employment—Part I*, 13 PRAC. LAW. 19 (1967).

**RURAL WATER DISTRIBUTION SYSTEMS:
AN ANALYSIS OF CREATING A LOCAL SYSTEM**

Perhaps one of the most perplexing problems in this modern age is that of rural poverty. Economic opportunity is scarce in rural areas and poverty stricken inhabitants have very little hope for progress. Some residents have great difficulty in providing their families with daily nutrition requirements.¹ So long as the rural area remains unattractive for growth and development these problems are likely to increase rather than decrease.

One of the prime contributing factors to rural poverty is the lack of sanitary water. A national public health survey taken in the late 1950's indicated that some 30,000 communities in rural America did not have a sanitary water supply.² Life in an area without a sanitary water supply can, at best, only be described as backward and unpromising. Outdoor plumbing and unsanitary hand-carried drinking water only add to the stigma attached to a rural area, thus making it even more difficult for the area to attract industrial development and additional population.

Congress felt there was an immediate need to make funds available that would increase the prospects of blighted rural areas.³ Residents and, more specifically, farmers all over rural America were finding it increasingly difficult to meet modern sanitary requirements with old fashion water systems, and Congress felt that updated water systems would stimulate the growth of rural areas and enable them to make their proper contribution to the growth of the overall economy.⁴ The need for assistance to rural population centers was also recognized by Secretary of Agriculture Orville Freeman,⁵ who pointed out that federal assistance was the primary source of aid available to accomplish the congressional objective of upgrading rural areas.⁶

Prospects for rural Americans are now brighter due to opportunities made available by a rural community program designed to make rural areas more attractive by providing federal funds for the construction of modern water distribution systems.⁷

¹ HUNGRY CHILDREN. A SPECIAL REPORT, SOUTHERN REGIONAL COUNCIL, ATLANTA, GA.

² WHITTEN, *A Breakthrough For Rural Communities In Their Struggle For Modern Water Services*, DICKEY DATA 4 (June/July, 1968) (Hereinafter cited as WHITTEN).

³ U. S. CODE CONG. AND ADM. NEWS 3407 (1965).

⁴ *Id.*

⁵ *Id.* at 3410.

⁶ *Id.* at 3414.

⁷ 7 U.S.C.A. § 1926 (Supp. 1969).

The purpose of this paper is to examine the availability of funds necessary to establish a rural water system with primary emphasis being placed on the Farmers Home Administration program. Government programs have a way of becoming perplex, and for this reason, the statutory guidelines governing funds distributed through FHA will be examined. The latter portion of this paper will emphasize the role that local state law plays in the creation of a water system with primary emphasis on the procedural aspects necessary to obtain permission from the competent authority to construct and operate a system.

With the avenue open, progress can travel if local citizens recognize the need for development. Before action can be initiated at the local level there must be a clear understanding of where funds come from and what guidelines govern their distribution.

As for the source of funds, the Secretary of Agriculture is authorized to make or insure loans through the FHA to associations, non-profit corporations, and public agencies to provide for the establishment of programs for the conservation, development and use of water projects that primarily will serve rural residents.⁸ The Secretary is further authorized to make grants to associations to finance specific projects for facilities for storage, treatment, purification and distribution of water in rural areas.⁹ A "project" for grant purposes includes facilities providing central service as well as facilities serving individual properties, or a combination of both.¹⁰

There is an initial limitation imposed on the Secretary's power to make grants to water associations. The amount of the grant must not exceed 50% of the development cost of the project to serve the area determined by the association.¹¹ In determining development cost so that maximum grant funds can be utilized it is significant to point out that in addition to regular construction costs, also properly includable are land costs and the cost of any necessary easements, rights-of-way, or water rights.¹²

As indicated in the Secretary's general power to make funds available, such funds are made available only to those associations, agencies, and non-profit corporations that will service rural areas. A rural area does not include any area, city or town, having a population in excess of 5,500 inhabitants.¹³ Therefore, those populated rural areas in Mississippi

⁸ *Id.* This section also provides financial assistance for planning such projects.

⁹ *Id.* § 1926 (a)(2). Grants cannot exceed \$100,000.00 in any fiscal year.

¹⁰ *Id.* § 1926 (a)(4)(B).

¹¹ *Id.* § 1926 (a)(2).

¹² *Id.* § 1926 (a)(4)(A). To be includable such costs must be necessary to the construction and operation of the facility.

¹³ *Id.* § 1926 (a)(7).

or other states having a population less than 5,500 persons are rural areas qualified for federal assistance.

Additional limitations are placed on grants to rural areas. In order to qualify for a grant, the association must show that it will serve a rural area which is not likely to decline in population below that for which the facility was designed.¹⁴ The design and planned construction must be such as to include a present system capacity to serve the existing population and a potential system capacity to meet the reasonably foreseeable growth needs of the service area.¹⁵ Grants will not be made unless the Secretary determines that the system is "necessary for orderly community development" consistent with existing area plans and not inconsistent with planning by a competent authority.¹⁶

The financial aid available through the FHA takes the form of a grant-loan combination and appears to be the single major source of funds available for rural water projects. One further limitation is that no loan or grant can be made if such loan or grant will cause the unpaid principal indebtedness of an association to exceed \$4,000,000 at any one time.¹⁷

Civic-minded Mississippi residents have recognized the need for rural development and are taking advantage of FHA funds. At the end of fiscal year 1967 Mississippi had taken the lead in the use of rural water programs by initiating some 440 distribution systems.¹⁸ Mississippi is second in this area only to Texas.¹⁹ Of the 440 facilities established in Mississippi only 70 were able to obtain grant funds and the grants, when made, were made as supplements to loans.²⁰ For this reason it is wise to remember that the program is one of a grant-loan combination, as evidenced by the fact that for the fiscal year 1968 the average loan for a water project was \$151,000; in comparison, the average grant was \$65,000—less than half the average loan.²¹

Funds are contingent on congressional provision. For the fiscal year 1969 the following are available:²²

¹⁴ *Id.* § 1926 (a)(3)(i).

¹⁵ *Id.* § 1926 (a)(3)(ii).

¹⁶ *Id.* § 1926 (a)(3)(iii). Competent authority is not defined. Generally it should be any political sub-division.

¹⁷ *Id.* § 1926 (a)(5).

¹⁸ Letter from Brad Dye, Jr., Director of Mississippi Agricultural and Industrial Board to author, March 27, 1969. (Hereinafter cited as Dye).

¹⁹ WHITTEN at 5.

²⁰ Dye.

²¹ Letter from James V. Smith, Administrator of FHA, to Jamie L. Whitten, House of Rep., March 28, 1969. (Hereinafter cited as Smith).

²² *Id.* Figures indicate a preference to insure loans and make direct loans rather than grants.

	<i>Mississippi</i>	<i>Nationally</i>
Direct—Water & Sewer	\$1,875,430	\$ 74,000,000
Insured—Water & Sewer	5,923,500	110,000,000
Grant—Water & Sewer	710,340	23,500,000

In order to insure funding through the FHA program, the local civic group sponsoring the project should engage an engineer to develop the preliminary design of a system that would serve the existing population and be co-ordinated with future population projections to include potential system capacity for reasonably foreseeable growth needs. The project plan also should include a base estimated cost.²³

In conjunction with construction plans a survey should be taken in order to determine the number of customers who would use the services of a water system if available. It would be wise to evaluate customer demand on the basis of customer type rather than on the bulk number of customers. Some basic categories for evaluation of customer types are: (1) Home (residential); (2) Home (multi-dwelling); (3) Business; (4) Manufacturing; and (5) Institutional (hospitals & schools). Such a survey can serve as a valuable guideline in planning system capacity in order to meet statutory requirements.²⁴ From a cost standpoint, the survey can be used to determine the service rate necessary to meet monthly operating cost and loan payment.

At this stage of system development the dual nature of the program (grant-loan) becomes of increasing importance. Preliminary surveys may bear out the fact that 100% loan financing would require a heavy annual loan payment thus greatly increasing the service rate to be charged to the customers of the proposed system. Consideration must be given to the relative income of the customer in order to determine what level service charge he can sustain. If pure loan financing exceeds this level, a partial grant can be used to bring the service cost within the reach of the subscribing customer.

Once the general construction plans have been developed and the customer survey for the service area has been taken, application is then made to the Farmers Home Administration for funding. In order to insure success in obtaining funds, care should be exercised to comply with the previously outlined statutory guidelines. For the purposes of this paper it is assumed at this point that the necessary funds were obtained.

At this point the sponsors of a rural water distribution system must turn their thoughts from federal assistance requirements to state re-

²³ 7 U.S.C.A. §1926(a) (4) (A) (Supp. 1969).

²⁴ Id. §1926 (a) (3) (ii).

quirements. Mississippi has an interest in water distribution and has chosen to regulate such in the public interest.

In 1956 the Mississippi Legislature acting in the public interest, vested the Public Service Commission of the State of Mississippi with the authority to regulate public utility rates and services in order to insure the residents of Mississippi that the rates would be fair and reasonable and that adequate service would be provided.²⁵

The original act of 1956²⁶ conveyed to the Commission exclusive original jurisdiction over the intrastate business and property of a public utility. A public utility by definition includes persons and corporations, or their lessees, trustees and receivers now or hereafter owning or operating equipment for the transmission, distribution, sale or resale of water to the public for compensation.²⁷ From this definition the conclusion seemingly is drawn that water distribution systems funded through the FHA would come under the general jurisdiction of the Commission,²⁸ and that their rates and services are subject to regulation.

However, the general jurisdiction of the Commission was amended in 1966 to provide that the Commission should have no jurisdiction to regulate the rate for sales of water by a non-profit corporation or association.²⁹ It should be noted that the 1966 Amendment just mentioned only excluded rates from the Commission's jurisdiction—not services. The amendment excluded the type system under discussion here from rate regulation. This jurisdiction exclusion was further defined in April of 1968 when the general jurisdiction clause was further amended to deny the Commission jurisdiction to regulate the rates of "sales of water by nonprofit corporations or associations where the governing body of such corporations or associations is elected by the consumers or appointed by the county board of supervisors."³⁰

Therefore, as it now stands, rural water associations funded under FHA are subject to rate regulations unless their officers are elected by the customers or appointed by the county board of supervisors. It would be wise in the initial development process to provide in the association charter for the election of officers by the customer in order to qualify under this exclusion.

²⁵ PUBLIC UTILITIES ACT OF 1956. CHAPTER 372, LAWS OF 1956, REGULAR SESSION.

²⁶ *Id.*

²⁷ MISS. CODE ANN. § 7716-01(D)(4) (Supp. 1968).

²⁸ Note that persons who supply water to tenants or employees for no compensation are excluded by statutory provision. MISS. CODE ANN., §1716-10(D)(5) (Supp. 1968).

²⁹ MISS. CODE ANN. § 7716-04 (Supp. 1966).

³⁰ MISS. CODE ANN. § 7716-04 (Supp. 1969).

Rate regulation is, of course, no subversive task master, but under the loan cost-service charge balance previously discussed, rates may be somewhat high in order to repay the borrowed money. Such high rates, of course, are adequately justified by the need for a sanitary water distribution system in a rural area. Therefore, it seems that association planners should avoid rate regulation if possible.

Water distribution systems come under the general jurisdiction of the MPSC,³¹ and therefore, consideration must be given to Mississippi statutory requirements.

The first basic requirement before project construction is started is to obtain a Certificate of Public Convenience and Necessity. No person³² shall construct facilities for the intrastate distribution of water for compensation unless they obtain from the Public Service Commission a certificate that the present and future public necessity and convenience requires the operation of such a system.³³ To obtain such a certificate a petition must be brought before the Commission. The matter is then set for hearing, and all interested parties are given notice of the hearing.

The Commission is authorized to prescribe reasonable rules and regulations necessary to carry out the provisions of the Public Utility Act.³⁴ Such rules have been published and are filed with the Secretary of State and are available for public inspection.³⁵ The filing of an application for a Certificate of Public Convenience and Necessity must conform to the rules of practice and procedures established by the Commission.

The first step in obtaining a Certificate is to file a petition with the Commission. An original and seven copies must be filed.³⁶ The petition, or formal application, should state the venue "before the Public Service Commission of Mississippi," and a "clear and concise statement of the facts upon which the application is based."³⁷ The provisions of the Public Utility Act relied on must be cited for reference, and the application must set out a request for the specific order for which petition is made.³⁸

³¹ Only rates are excluded, water systems are not totally excluded from jurisdiction. See note 30.

³² The definition of "person" includes non-profit corporations and associations. MISS. CODE ANN. § 7716-01(B) (1956).

³³ MISS. CODE ANN. § 7716-05 (1956).

³⁴ MISS. CODE ANN. § 7716-13 (1956).

³⁵ Filing with the Secretary of State is a statutory requirement. MISS. CODE ANN. § 7716-13 (1956).

³⁶ MISSISSIPPI PUBLIC SERVICE COMMISSION, UTILITY RULES OF PRACTICE AND PROCEDURE, RULE 2(1). (Hereafter cited as PUBLIC SERVICE COMMISSION).

³⁷ *Id.*, Rule 5 (B).

³⁸ *Id.*

If the petitioner is a corporation, a certified copy of its charter of incorporation, or articles of incorporation, should be attached to the application.³⁹

The application (petition) must also contain necessary financial data;⁴⁰ a newly-formed water association should be in a position to show the Commission that it is in a strong enough financial position to render service. This should present no problem, for in most cases the petition will not be filed until after the financial plans have been solidly developed with the Farmer's Home Administration.

The necessary financial data must include a balance sheet of the latest available data together with an income statement.⁴¹ If the association has only been funded and has made no expenditures, the income statement will, of course, be a minor item.

Some of the associations could decide to issue stock. If this is the case, financial data such as the amount and kinds of stock authorized,⁴² the amount and kinds of stock issued and outstanding,⁴³ and the dividends paid during the last 5 years⁴⁴ should be attached to the basic balance sheet.

The petition in reality is seeking permission to service a particular area. For this reason the petitioner must attach two copies of a half-inch scale county map⁴⁵ showing all facilities, existing and under construction, and the proposed service area. The Commission prefers that the geographical data be submitted in the form of three separate maps.⁴⁶ This data when submitted in its preferred form should be in compliance with the procedural rules of practice.⁴⁷ The preferred form is as follows:

(1) Two (2) copies of a map showing particular portions of the overall area to a scale of 1" to 400 feet, so as to more clearly portray such particular portions of the area.

(2) Two (2) copies of a ½" country map showing the proposed service area. Include a (metes and bounds) description of the area.

³⁹ *Id.*, Rule 5(D). Two (2) copies required.

⁴⁰ *Id.*, Rule 5(E).

⁴¹ *Id.*, Rule 5(E)(e).

⁴² *Id.*, Rule 5(E)(a).

⁴³ *Id.*, Rule 5(E)(b).

⁴⁴ *Id.*, Rule 5(E)(d).

⁴⁵ *Id.*, Rule 6(D)(c). Mississippi Highway Department county map—scale ½" to the mile.

⁴⁶ Requirements for Filing a Formal Application before the Mississippi Public Service Commission for a Certificate of Public Convenience and Necessity, published by Mississippi Public Service Commission.

⁴⁷ PUBLIC SERVICE COMMISSION, RULE 6(D)(C) & (d).

(3) Two (2) copies of a map or facility layout sheet showing the location, type, and size of the proposed facilities, to a scale of 1" to 400 feet. Include technical data on well, pumps, and tanks ⁴⁸

Once this information is compiled it becomes a part of the petition submitted to the Commission.

Even though the Commission does not regulate the rates of water associations, tariff information should be furnished for informational purposes only.⁴⁹

A sample copy of a formal petition filed in accord with the rules of the Commission is attached for reference purposes.⁵⁰

The foregoing discussion concerns only the basic procedure to follow in filing a petition for a Certificate of Public Convenience and Necessity. Once the petition has been filed with the Commission, the case is docketed,⁵¹ and upon written application of the parties witnesses may be subpoenaed,⁵² and service of process extends to all parts of the state.⁵³ The Commission then fixes the time and place of the hearing and gives notice thereof to interested parties by certified mail.⁵⁴

Attorneys petitioning for a Certificate of Convenience and Public Necessity should note that even though the rules of evidence should conform to the requirements of the courts of record in the state, the Commission can permit deviation from these requirements if it feels that the introduction of such evidence would be in the public interest;⁵⁵ this provision for exception gives the Commission wide latitude in admitting evidence. This procedure is as it should be, for here we are concerned with an application for a certificate to allow construction of a water distribution system which is clearly in the public interest. However, when petitions are sharply contested, care should be exercised to protect both the petitioner and the contestant's rights, and the "public interest" exception should not be used as a device to defeat a legitimate protest.

During the course of the hearing the burden of proof is on the petitioner to convince the Commission that a certificate should issue. When a petition is in contest the burden of proof is carried by the

⁴⁸ See note 46 *Supra*.

⁴⁹ See PUBLIC SERVICE COMMISSION, RULE 12 (c) & 15 (A).

⁵⁰ See Appendix I.

⁵¹ PUBLIC SERVICE COMMISSION, RULE 2(A).

⁵² *Id.*, Rule 2(C).

⁵³ *Id.*, Rule 2(D).

⁵⁴ *Id.*, Rule 8(B).

⁵⁵ *Id.*, Rule 8(D).

parties in a like manner as required by the courts of record of the state.⁵⁶

At the conclusion of the hearing the Commission's order and findings are handed down. The order must be supported by substantial evidence presented during the course of the hearing in order to enable the appellate court to determine the basis of the Commission's conclusions.⁵⁷ The order is served on the party against whom it runs⁵⁸ and takes effect twenty days after service.⁵⁹ This twenty day provision should be of little concern to water associations since the association is seeking permission to construct facilities and the order is not in the nature of an injunction. Once the order is given it continues in force until changed or revoked by the Commission.⁶⁰

If the order is adverse, any party to the proceeding may make application for rehearing,⁶¹ which application must be filed with the Commission within thirty days after the order has been handed down.⁶² The application must be either granted or refused within twenty days after filing,⁶³ and failure to act within twenty days operates as a refusal by the Commission to rehear the cause.⁶⁴

In addition to a rehearing, chancery court review is available, whether application for a rehearing has been filed with the Commission or not.⁶⁵ The proper venue for review of a Commission order is in the Chancery Court, First Judicial District of Hinds County, Mississippi.⁶⁶

The brief filed on review should contain a brief statement of the nature of the proceedings before the Commission and a statement of the order complained of.⁶⁷ The record of the hearing is transferred from the Commission and is the basis of the review in chancery court, no new or additional evidence being admitted. The statute further provides that:

The [Commission] order shall not be vacated or set aside either in whole or in part, except for errors of law, unless the

⁵⁶ *Id.*, Rule 8(E).

⁵⁷ MISS. CODE ANN. § 7716-22 (1956).

⁵⁸ *Id.* Copies are also served on the parties to the proceeding.

⁵⁹ *Id.* Additional time is granted if, in the judgment of the Commission, the order cannot be complied with in 20 days.

⁶⁰ *Id.*

⁶¹ MISS. CODE ANN. § 7716-25 (1956).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at § 7716-26(a) (1956).

⁶⁶ *Id.*

⁶⁷ *Id.*

court finds that the order of the commission is not supported by substantial evidence, is contrary to the manifest weight of the evidence, is in excess of the statutory authority or jurisdiction of the commission, or violates constitutional rights.⁶⁸

There is no appeal, however, from interlocutory orders of the Commission.⁶⁹

If chancery court review is adverse to your cause, an appeal in accordance with established law may be had to the Mississippi Supreme Court.⁷⁰ All matters appealed from the Commission are given statutory preference and are to be disposed of at the earliest moment,⁷¹ because the matter in issue is in the public interest and without such a provision water associations failing to obtain a Certificate of Public Convenience and Necessity would find their position to be one of uncertainty. The uncertainty results from the association's having planned a system and obtained federal funds and yet being unable to proceed with construction and development because final adjudication is stuck in the slow appellate process of the judiciary.

CONCLUSION

Government-funded private water distribution systems for rural areas are an effective means of stimulating the economy of Mississippi. Mississippians have recognized the need for rural redevelopment and are using rural water development programs as an effective weapon to fight rural degeneration.⁷²

Rural water projects fight rural degeneration and stimulate Mississippi's economy. In addition to making the rural area more attractive to industry, the area economy is stimulated by money injected for the purchase of goods and services used in system construction.⁷³

In addition, rural water projects can increase farm production and improvements. The Mississippi Agricultural and Industrial Board indicates that:

⁶⁸ *Id.* at § 7716-26(d). See *Mississippi Power Co. v. South Mississippi Elec. Power Ass'n.*, 254 Miss. 754, 183 So.2d 163, *cert. denied*, 385 U.S. 823 (1966).

⁶⁹ *Mississippi Power Co. v. Mississippi Pub. Serv. Comm'n.*, 240 Miss. 621, 128 So.2d 351 (1961).

⁷⁰ MISS. CODE ANN. § 7716-28 (1956).

⁷¹ *Id.* at § 7716-29. This statute covers both Chancery review and appeal to the Supreme Court.

⁷² In Congressional District I, consisting of Attala, Bolivar, Calhoun, Chickasaw, Choctaw, Clay, Leflore, Lowndes, Monroe, Montgomery, Oktibbeha, Sunflower, Washington and Webster counties, 152 water projects are currently in operation serving some 18,000 families. See Smith, *supra* note 21.

⁷³ Dye, *supra* note 18.

As the conveniences of city living become available in rural areas, many of our people will continue to live on the farm, even though they may have regular employment in nearby cities or towns. Experience has indicated to us in many cases that because of these outside sources of income, these people will not only continue farming on a part-time basis but will even do a better job.⁷⁴

And, as farm production increases, farm improvements increase. An average of seven to eight new homes are built on each new water system shortly after completion.⁷⁵

Once a rural area has developed an adequate water system the stigma of backwardness and non-productivity begins to diminish and the area becomes attractive to residents and industry suited to the particular locale, thus enabling the area to grow and make its proper contribution to the overall economy.

In order to achieve maximum benefits from private water systems planning should not be limited to the particular service area. Plans for private water systems should be meshed into the overall plans of the county, the city and the state. Private water systems are helping the economy of Mississippi and will continue to do so in the future. Every effort should be made by state and local government agencies to encourage and assist their development.

William Larry Latham

APPENDIX I

Sample

Before the Public Service Commission of the State of Mississippi U - _____ Long Branch Water Association, Inc.	RE: Application of Long Branch Water Association, Inc. for a certificate of public convenience and necessity authorizing it to construct, operate, and maintain a water system within a specified area in and around the community of Leaf, Acorn County, Mississippi.
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⁷⁴ *Id.*

⁷⁵ *Id.*

Petition

Comes now Petitioner, Long Branch Water Association, Inc., a Mississippi Corporation, having its domicile and principal place of business at Leaf, in Acorn County, Mississippi and petitions this Honorable Commission for a Certificate of Public Convenience and Necessity to operate as a public utility rendering water service to the public pursuant to the provisions of Chapter 372, Laws of 1956 of the State of Mississippi, usually called the Public Utilities Act of 1956, being Sections 7716 through 7716-38 of the Mississippi Code of 1942, Recompiled, and respectfully shows unto the Commission the following facts, to-wit:

I

Petitioner, Long Branch Water Association, Inc., is a utility as defined in Section 7716-01-D (4) of the Mississippi Code of 1942, Recompiled; as such, the construction and operation of the facilities of petitioner in a certain specified Service Area and any extension thereof falls under the purview of said Public Utilities Act.

II

Petitioner is a new organization and proposes to commence furnishing water to its customers as soon as its well and water distribution system have been completed; the mailing address and office location of petitioner is: Long Branch Water Association, Inc., 123 Oak St., Leaf, Mississippi.

III

A copy of petitioner's "Charter of Incorporation" is attached hereto as Exhibit 1.

IV

Petitioner would show that it is financially able to render the service in the area requested. An appropriate Financial Statement is attached hereto as Exhibit 2.

V

The area in which the Petitioner intends to offer service and operate as a public utility, being a public water system, is shown on a ½ inch Scale County Map of Acorn County, attached hereto as Exhibit 3 (B).

VI

There is included herewith a map or plat showing the Proposed Service Area of Petitioner, to a larger scale, so as to more clearly portray the full extent of the area and true geographic conditions therein; said map or plat being marked as Exhibit 4.

VII

There is included herewith a complete set or copy of the Construction Plans and Drawings necessary to construct the water distribution system upon the rights of way of the public roads within the area to be served; said plans and drawings are marked as Exhibit 5 (A).

A set or copy of the Specifications as determined and prepared by the Engineer who planned and designed the system are included herewith and marked Exhibit 5 (B).

VIII

Petitioner would show that the public convenience and necessity requires the issuance of a Certificate by this Honorable Commission and is informed that it should obtain a Certificate of Public Convenience and Necessity to operate as a public utility as hereinabove set forth prior to furnishing of water to its customers.

WHEREFORE, premises considered, Petitioner prays that this Honorable Commission set this matter for a hearing at the earliest possible date; that process be issued by this Commission, giving reasonable notice of the hearing to all interested persons, as in its judgment may be necessary, stating that a hearing will be held and setting forth the purpose thereof.

Petitioner further prays that upon such hearing this Commission will grant a Certificate of Public Convenience and Necessity to Petitioner, Long Branch Water Association, Inc., permitting the Petitioner to operate as a public rendering water service to the public pursuant to the provisions of said Public Utilities Act of 1965, as amended.

Water & Post

Attorneys for Petitioner

Respectfully submitted,

LONG BRANCH WATER
ASSOCIATION, INC.

BY _____ BY _____

Jack R. White, President

Affidavit

State of Mississippi

County of Acorn

Personally came and appeared before me, the undersigned Notary Public in and for the County and State aforesaid, the within named

Jack R. White, President of Long Branch Water Association, Inc., who being by me first duly sworn, stated on oath that the matters, facts, things, and figures set forth in and stated in the above and foregoing petition are true and correct as therein stated.

Jack R. White

SWORN TO and SUBSCRIBED before me this March 18, 1966.

Notary Public

(S E A L)

My commission expires 1-9-69

STUDENT NOTES

WORKMEN'S COMPENSATION—OCCUPATIONAL DISEASE COVERAGE IN MISSISSIPPI

I. Definition and Purpose

In 1968 the Mississippi Legislature amended the State's workmen's compensation law to add occupational disease coverage.¹ The 1968 legislation says that an occupational disease, to be compensable, has to arise "out of and in the course of employment without regard to fault as to the cause," and it is "deemed to arise out of and in the course of employment when there is evidence that there is a direct casual connection between the work performed and the occupational disease."²

The purpose of this paper is to present a summary of the Mississippi case law on disease coverage under the Workmen's Compensation Act and to aid the practicing attorney with a practical discussion of various problems that may arise in Mississippi occupational disease cases. In doing so, we shall benefit from experience in other states.

II. Recovery Prior to the 1968 Amendment

"The general rule is that occupational diseases are compensable only by virtue of statute."³ In denying compensation benefits to a painter who became disabled as a result of lead poisoning, the Mississippi Supreme Court said in 1961:

At the time this State considered and adopted the Workmen's Compensation Act, the lawmakers knew . . . that the courts generally had not undertaken to extend such coverage [for occupational diseases] by judicial construction. It seems clear that if the Legislature had intended to provide such coverage, it would have made express provisions therefor in the Act. . . . We do not think that the court has ever decided that an occupational disease is compensable.

. . . [T]he question . . . is a legislative matter.⁴

In so ruling, the court clearly distinguished between *injury* and *occupational disease*.

Nevertheless, through a liberal interpretation and application of the word "*injury*," the court has granted workmen's compensation recovery

¹ Miss. Code Ann. §§ 6998-01, 02(2), 04 (Supp. 1968).

² Miss. Code Ann. § 6998-04 (Supp. 1968).

³ Heckford v. International Paper Co., 242 Miss. 337, 340; 135 So.2d 415, 416 (1961).

⁴ *Id.* at 340, 135 So.2d at 416 (1961).

in certain cases of dermatitis,⁵ tuberculosis,⁶ heart attack,⁷ hypertensive encephalopathy,⁸ cerebral hemorrhage,⁹ cancer,¹⁰ and undulant fever.¹¹

In allowing recovery, the court has said that an injury may develop over a reasonably definite period of time without suddenness¹² and that it was not necessary that external force be applied.¹³ Casual connection with employment was necessary.¹⁴ Thus, the court has denied recovery for heart attack in the absence of adequate proof of casual connection with employment, emphasizing that the burden of proof is upon the claimant.¹⁵

Prior to the 1968 occupational disease amendments the "[c]ourt in numerous cases . . . established the principle that a preexisting disease or infirmity of an employee does not disqualify a claim if the employment aggravated, accelerated or combined with the disease or infirmity to produce the death or disability for which compensation is sought."¹⁶ The work did not have to be the sole cause of the "injury"; it was sufficient if the work was only a contributing factor.¹⁷

In 1962 the Legislature added coverage for disability and death resulting from occupational radiation exposure, by specific definition of

⁵ *Komp Equip. Co. v. Clinton*, 236 Miss. 560, 111 So.2d 259 (1959); *Hardin's Bakeries v. Ranagar*, 217 Miss. 463, 64 So.2d 705 (1953); *Christopher v. City Grill*, 218 Miss. 638, 67 So.2d 694 (1953).

⁶ *Jackson Ready-Mix Concrete v. Meadows*, 198 So.2d 576 (1967).

⁷ *Washington v. Greenville Mfg.*, 223 So.2d 642, (Miss. 1969); *Shivers v. Biloxi-Gulfport Daily Herald*, 236 Miss. 303, 110 So.2d 359 (1959); *Central Elec. Power Ass'n. v. Hicks*, 236 Miss. 378, 110 So.2d 351 (1959); *Russell v. Sohio So. Pipe Lines, Inc.*, 236 Miss. 722, 112 So.2d 357 (1959); *Harper Foundry & Mach. Co. v. Harper*, 232 Miss. 873, 100 So.2d 779 (1958); *Schilling v. Mississippi State Forestry Comm'n*, 226 Miss. 858, 85 So.2d 562 (1956); *Southern Eng'r. & Elec. Co. v. Chester*, 226 Miss. 136, 83 So.2d 811 (1955); *Thornbrough Well Serv. Co. v. Brown*, 223 Miss. 322, 78 So.2d 159 (1955).

⁸ *W. G. Avery Body Co. v. Hall*, 224 Miss. 51, 79 So.2d 453 (1955).

⁹ *Mississippi Stationery Co. v. Segal*, 214 So.2d 820 (Miss. 1968); *Highway Patrol v. Neal's Dependents*, 239 Miss. 505, 124 So.2d 120 (1960); *Insurance Dep't of Miss. v. Dinsmore*, 233 Miss. 569, 102 So.2d 691, *suggestion error overruled*, 104 So.2d 296 (1958); *Cowart v. Pearl River Tung Co.*, 218 Miss. 472, 67 So.2d 356 (1953).

¹⁰ *Dixie Pine Prod. Co. v. Dependents of Bryant*, 228 Miss. 595, 89 So.2d 589 (1956).

¹¹ *Mid-South Packers, Inc. v. Hanson*, 253 Miss. 703, 178 So.2d 689 (1965).

¹² *Insurance Dep't. of Miss. v. Dinsmore*, 233 Miss. 569, 102 So.2d 691, *suggestion error overruled*, 104 So.2d 296 (1958).

¹³ *Hardin's Bakeries v. Ranagar*, 217 Miss. 436, 64 So.2d 705 (1953).

¹⁴ *Capitol Broadcasting Co. v. Wilkerson*, 240 Miss. 64, 126 So.2d 242 (1961), (coverage denied).

¹⁵ *Id.*

¹⁶ *W. G. Avery Body Co. v. Hall*, 224 Miss. 51, 64; 78 So.2d 453, 457 (1955). See 1 A. LARSON, WORKMEN'S COMP. LAW § 12.20 (1968) [hereinafter cited as LARSON].

¹⁷ *Insurance Dep't of Miss. v. Dinsmore*, 223 Miss. 569, 102 So.2d 691, *suggestion error overruled*, 104 So.2d 296 (1958).

"injury."¹⁸ This primarily benefitted personnel in the hospital and medical field. The 1968 legislation left the 1962 legislation undisturbed.

III. Proportionate Reduction for Pre-existing Disease

In 1958, the court said: "[I]f substantial contributing causal connection is found, the claim is fully compensable without apportionment or deduction."¹⁹ Now, by 1958 and 1960 amendments, "Compensation . . . shall be reduced by that proportion which such preexisting physical handicap, disease or lesion contributed to the production of the results following the *injury*." (emphasis added).²⁰ In 1967 the court affirmed fifty percent apportionment in a case involving reactivation by injury of preexisting tuberculosis.²¹

Cognizant of the fact that in judicial decisions the word "injury" had sometimes embraced what some thought to be occupational disease, the 1968 Legislature tried to clarify the law by saying:

Occupational diseases, or the aggravation thereof, are excluded from the term "injury," provided further, however, that except as otherwise specified all provisions of this act apply equally to occupational diseases as well as injury.²²

It is submitted here that the legislative *intent* was to allow proportionate reduction in occupational disease claims, by use of the words "except as otherwise specified all provisions of this act apply equally to occupational diseases as well as injury."²³

However, this ignores the fact that §6998-04 specifically allows for proportionate reduction in the amount that "such preexisting physical handicap, disease or lesion contributed to the production of the results following the *injury*." (emphasis added).²⁴ Further, in a subsection added to §6998-04 in 1968, the Legislature again referred to proportionate reduction "following injury," making no mention of occupation disease.²⁵

Thus, an attorney representing an occupational disease claimant with a pre-employment history of the same disease could argue that

¹⁸ Miss. CODE ANN. § 6998-02(2) (Supp. 1968).

¹⁹ Insurance Dep't of Miss. v. Dinsmore, 233 Miss. 569, 578; 102 So.2d 691, 694, *suggestion error overruled*, 104 So.2d 296 (1958).

²⁰ Miss. Code Ann. §6998-04 (Supp. 1968). See Ch. 454, 1958, Gen Laws of Miss., *as amended*, by Ch. 277, 1960 Gen. Laws of Miss.

²¹ Jackson Ready-Mix Concrete v. Meadows, 198 So.2d. 576 (Miss. 1967). See also Federal Compress & Whse. Co. v. Clark's Dependent, 246 Miss. 868, 152 So.2d. 921 (1963).

²² Miss. Code Ann §6998-02(2) (Supp. 1968).

²³ *Id.*

²⁴ Miss. Code Ann. §6998-04 (Supp. 1968).

²⁵ Miss. Code Ann. §6998-04(3) (Supp. 1968): "After the date the claimant reaches maximum medical recovery, weekly compensation benefits and maximum recovery shall be reduced by that proportion which the pre-existing physical handicap, disease or lesion contributes to the results following injury."

there should be no proportionate reduction inasmuch as it is applicable in cases of *injury*,²⁶ and "[o]ccupational diseases, or the aggravation thereof, are excluded from the term 'injury. . .'"²⁷ Furthering his argument, he could point to the numerous other provisions of the Act, *not involving the word "injury,"* and say that *those* are the other provisions of the Act applicable to occupational diseases as well as injury.²⁸

It is submitted that legislative clarification is needed in §6998-04. If proportionate reduction is intended in occupational disease cases, then the words, "or occupational disease" should follow the word "injury," in the two places where it presently does not in this section of the compensation act.

IV. Successive Carriers: Who Pays?

Suppose a painter worked for Able Company for fifteen years, handling lead paint, then went to work for Baker Company, where he also handled lead paint. Six months later he went to his doctor complaining of weakness, backache, headache, constipation, chest pains, a metallic taste in his mouth, and muscular paralysis at the wrist with a resulting wrist drop. The doctor ran various tests and correctly diagnosed lead poisoning.

Query: Which employer is liable?

In his excellent treatise on workmen's compensation, Professor Larson says that, "When a disability develops gradually, or when it comes as a result of a succession of accidents, the insurance carrier covering the risk at the time of the most recent injury or exposure bearing a causal relation to the disability is usually liable for the entire compensation."²⁹ This harsh rule follows the general principle of the compensability of the aggravation of preexisting conditions.³⁰

Apportionment between successive carriers is worked out in some jurisdictions, however, either by express statute or by judicial decision.³¹ The "last injurious exposure" rule has been limited by legislation in several states to the last such employer in whose employment the employee was exposed for a minimum of sixty days.³²

The result is usually different where the employee has an occupational disease *disability* under the first employer, and then a recurrence under the second employer; the first carrier is liable.³³ The second employer might be liable for increased disability caused by the added exposure, but not for natural progress of the disease.³⁴

In 1965, the Mississippi court dealt with an *injury* case where only one employer was involved, but insurance carriers changed between two

²⁶ Miss. Code Ann. §6998-04 (Supp. 1968).

²⁷ Miss. Code Ann. §6998-02(2) (Supp. 1968).

²⁸ *Id.*

²⁹ 3 LARSON §95.00.

³⁰ 3 LARSON §95.12.

³¹ 3 LARSON §95.00.

³² 3 LARSON §95.24.

³³ 3 LARSON §95.26.

³⁴ *Id.*

sieges of *illness*. The second illness was diagnosed as undulant fever resulting from cuts and scratches inflicted by contaminated saws in a packing house "gut hasher." The first illness may or may not have been undulant fever. The court said it was immaterial, as "the Mississippi act does not provide for contribution between insurance carriers, or for *any method* by which the Commission may adjust equities between carriers." (emphasis added).³⁵

The difficulty in writing a statute so clear as to eliminate disputes between succeeding carriers is recognized. Such legislation could often result in harshness, with clarity as its principal redeeming virtue. Yet, certainly, more legislative study is warranted.

There would seem to be merit in a statute limiting the "last injurious exposure" rule to the last employer of at least sixty days' duration. Also, there is merit in a statute that would clearly cover as compensable an occupational disease manifested within two years, or some other specified time, of the termination of employment. This would prevent an unemployed man from bearing alone the financial burden of a disease otherwise intended to be covered. Expert medical opinion as to the duration which various diseases concealed themselves could aid the legislators. Possibly different time limits for different diseases should be specified.

V. Compensability of Common Infectious Diseases

What if an employee contracts measles, mumps, or some other common infectious disease on the job? Will it be covered as an occupational disease? The many cases from other jurisdictions have failed to reach accord. It is not within the scope of this note to include an exhaustive study of all other jurisdictions. The intent is to define the problem and discuss what may develop as cases unfold in Mississippi.

The Mississippi Supreme Court took a major step in February, 1969, when in a case involving tornado injury of an employee, it recognized "an employee's right to compensation for injury as 'arising out of' his employment when the employee is injured at the place where he is required to be engaged in the employer's business, and not that of his own."³⁶ In so ruling, Mississippi embraced, at the very least in Act of God cases, the so-called "positional risk" doctrine, a doctrine which conceivably could be extended to cover as occupational disease any disabling disease contracted while at the required place of work. The "positional risk" doctrine is the most liberal possible view that can be taken in awarding compensation. Larson categorizes it as "whenever the injury occurred because the employment required the claimant to occupy what turned out to be a place of danger."³⁷

³⁵ *Mid-South Packers, Inc. v. Hanson*, 253 Miss. 703, 708, 178 So.2d. 689, 691 (1965). *Contra. Arender v. National Sales, Inc.*, 193 So.2d 579 (Miss. 1967), in which first injury was in 1962 under Carrier A, and second injury was in 1963 under Carrier B. Held: Carrier B liable only for one-third of the permanent partial disability as first accident caused two-thirds of the disability.

³⁶ *Wiggins v. Knox Glass, Inc.*, 219 So.2d 154, 158 (Miss. 1969).

³⁷ 1 LARSON § 10.00.

Thus, a teacher in a private school who suffers encephalitis communicated from a pupil whom she is paid to teach might be deemed to have an occupational disease. The major problem would seem to be one of proof of causation. It would not be enough, it would seem, to say that, "I got the disease from one of my students," when the disease is epidemic in the area; the disease might just as readily have been contracted at the grocery store or at church. But where the claimant can prove that the disease was contracted on the job, then coverage could well be allowed. It remains to be seen whether the court will confine the positional risk doctrine either to Act of God cases, or to *injuries* as opposed to occupational disease claims. However, it is difficult to see why an injured man should be compensated when his occupational duties require him to be in the path of a tornado, and then *deny* coverage to another worker who contracts encephalitis from an associate with whom he is required to work.

In *Mason v. Y.W.C.A.*,³⁸ coverage was allowed in New York for a telephone operator who contracted tuberculosis through an infected mouthpiece. Twenty years later in *Paider v. Park East Movers*,³⁹ coverage was denied to a New York truck driver who contracted tuberculosis from his partner in the truck, because the disease was a hazard of the particular job, not of truck driving in general. If the positional risk doctrine is applied to occupational disease in Mississippi, the truck driver would be covered in Mississippi.

A 1961 case, *Capitol Broadcasting Co. v. Wilkerson*, said in dicta that arteriosclerosis was not an occupational disease as "there is no substantial evidence from which the medical profession can conclude that it occurs more often in one profession or occupation than in another."⁴⁰

Thus, in Mississippi we have on one hand the possibility of covering under the "positional risk" doctrine any disease contracted on the job, and on the other hand the possibility of a requirement that the disease be peculiar to the employment . . . with a broad area for judicial interpretation "in between."

The statute requires "a direct causal connection between the work performed and the occupational disease."⁴¹ It is submitted that this does not necessarily answer the problem. For example, defense lawyers could argue that there is no causal connection between operation of a lathe and the disease known as gonorrhea. Plaintiffs' attorneys could argue that where lathe operators share the use of protective goggles and one contracts the disease from another, then there is a causal connection.⁴²

³⁸ *Mason v. Y.W.C.A.*, 68 N.Y. Supp.2d 510, *leave to appeal denied*, 74 N.E.2d 486 (1947).

³⁹ *Paider v. Park East Movers*, 280 N.Y. Supp.2d. 140 (1967).

⁴⁰ *Capitol Broadcasting Co. v. Wilkerson*, 240 Miss. 64, 69, 126 So.2d 242, 244 (1961).

⁴¹ Miss. Code Ann. § 6998-04 (1956).

⁴² 1A LARSON § 41.40 (Larson discusses cases where diseases considered non-occupational may become occupational because the employment *facilitates its transmission*, as in the case of the telephone operator contracting tuberculosis from contact with an infected mouthpiece; *supra* note 38).

It is an understatement to say that this is an area where we may encounter initial confusion on the part of opposing counsel. Employers and carriers obviously will be reluctant to pay compensation for diseases usually looked upon as non-occupational. The legislature can either clarify or abandon the initiative to other equally effective law makers—our Mississippi Supreme Court justices.

VI. Conclusion

Most contested cases ultimately will hinge on whether or not the claimant can prove causation—that the employment caused the disease. But this begs the question, as we have seen.

We have a basically sound statute in Mississippi. As with any legislation, experience will determine where legislative refinement is needed. Meanwhile, the need for clarifying amendments is already recognized in the area of proportionate reduction for preexisting disability (see Section IV).

It is submitted that the legislature should consider the problems arising from successive employments, and manifestation of disease following termination of employment, as discussed in Section IV. Attention is also invited to the opportunity to make the legislature's intent clear, in unmistakable language, regarding application of the "positional risk" doctrine to disease cases.

J. Jerry Langford

ADMIRALTY—THE PROBLEMS OF "IN NAVIGATION" AND "IN CONTROL" FOR THE INJURED SHORE-BASED WORKER

Appellant sustained injuries when he fell through an open hatch on a barge owned by appellee. Appellant was employed by Saucer Marine Service as a shore-based worker, assisting in making minor repairs to the barge. The barge was in a floating dry dock for approximately nineteen hours. The appellant charged unseaworthiness of the barge and negligence of its owner due to the open hatch through which he fell as well as inadequate lighting in the vicinity of the open hatch cover. The district court held that there was no warranty of seaworthiness owed by appellee to appellant, and that there was no negligence on the part of appellee. The Fifth Circuit affirmed, holding that the ship repair facility had exclusive control of the barge and the lighting under which the repairs were made. The court held that surrender of control of the barge to Saucer by its owner was enough to defeat both the claim of unseaworthiness and negligence in failure to furnish a safe place to work. *Moye v. Sioux City & New Orleans Barge Lines, Inc.*¹

The theory of the shipowner being required to answer for personal injuries resulting from the failure to provide a seaworthy ship is believed

¹ 402 F.2d 238 (5th Cir. 1968), *Petition for rehearing on writ of certiorari now pending.*

to have originated in Justice Brown's dictum in *The Osceola*,² as the second of his four famous propositions: "That the vessel and her owner are . . . liable to an indemnity for injuries received by a seaman in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship."³ The doctrine has been further described as "a species of liability without fault . . . neither limited by conceptions of negligence nor contractual in character. . . . [and] a form of absolute duty owing to all within the range of its humanitarian policy."⁴

The absolute duty of seaworthiness became firmly imbedded in the general maritime law with the decision of *Mahnich v. Southern S. S. Co.*,⁵ which held that the shipowner's duty to furnish a seaworthy ship is absolute, not predicated on negligence and not satisfied by the exercise of due diligence. A good discussion of exactly what is and what is not seaworthiness is found in *Lester v. United States*.⁶ The doctrine of seaworthiness was greatly expanded by the case of *Seas Shipping Co. v. Sieracki*,⁷ which gave the longshoreman the seaman's remedy for personal injury caused by the unseaworthiness of the ship. This view is based on the theory that the liability arises from performing the ship's service with the owner's consent, and one who performs seaman's services should receive the seaman's protection of a seaworthy vessel.⁸ Another landmark case extended the doctrine to a carpenter who was a shoreside employee injured aboard ship.⁹

After *Sieracki*, the Second Circuit¹⁰ and the Third Circuit¹¹ developed a doctrine of control as a restriction on seaworthiness. The control element has been described as follows:

[W]hen the owner surrenders control of any part of his ship to a stevedore in charge of loading or unloading, his duty of

² 189 U.S. 158 (1903).

³ *Id.* at 175; *See* *Vickers v. Tumey*, 290 F.2d 426, 433 n. 5 (5th Cir. 1961) for Fifth Circuit's definition of seaworthiness.

⁴ *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 94-95 (1946).

⁵ 321 U.S. 96 (1944). The following also hold that the duty to furnish a safe and seaworthy vessel, appliances, appurtenances and equipment is an absolute non-delegable duty: *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960); *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325 (1960); *Boudin v. Lykes Bros. S.S. Co.*, 348 U.S. 336 (1955); *Petterson v. Alaska S.S. Co.*, 205 F.2d 478 (9th Cir. 1953), *aff'd*, 347 U.S. 396 (1954); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953); *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946); *but see* *Tetreault, Seamen, Seaworthiness and the Rights of Harbor Workers*, 39 CORNELL L.Q. 381, 386-403 (1954).

⁶ 234 F.2d 625 (2d Cir. 1956).

⁷ 328 U.S. 85 (1946).

⁸ 1 M. NORRIS, *THE LAW OF SEAMEN* 121 (2d ed. 1962).

⁹ *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953) which extended the *Sieracki* doctrine to all other harbor workers not considered stevedores.

¹⁰ *Lauro v. United States*, 162 F.2d 32 (2nd Cir. 1947); *Grasso v. Lorentzen*, 149 F.2d 127 (2d Cir. 1945).

¹¹ *Lopez v. American Ha. S.S. Co.*, 201 F.2d 418 (3rd Cir. 1953).

seaworthiness as to the part surrendered extends only up to the time the stevedore assumes control. If thereafter the agents of the stevedore, while he is in control, *create an unsafe condition where none existed before, the shipowner is not liable for resulting accidents.* (emphasis added).¹²

In view of the above definition it should be remembered that the hatch cover in the instant case was in the control of the shipowner when the condition which caused the accident was created. The court in the instant case apparently relied on the control doctrine to deny recovery for the appellant; however, as previously stated, the duty to furnish a seaworthy vessel is a non-delegable one¹³ and imposes upon the ship owner liability not dependent upon concepts of fault, such as "surrender of control."

By affirming *Petterson v. Alaska S. S. Co., Inc.*,¹⁴ the Supreme Court apparently rejected the "relinquishment of control" doctrine when the court held that a shipowner could be held liable for an unseaworthy condition caused by the longshoremen themselves. The stevedores brought on board a latently defective "snatch block" which caused the injury. The fact that the owner was not actually in control of the area and had no power to choose the stevedores' equipment was held irrelevant. *Petterson* holds that the "relinquishment of control doctrine" is based on negligence and is not applicable to an owner's liability based upon the non-delegable warranty of seaworthiness. Two eminent admiralty scholars have attacked the "relinquishment of control doctrine." Norris says that:

Petterson . . . substantially knocked the props from under the relinquishment of control theory and left liability owed to the person injured from an unseaworthy condition primarily in the lap of the shipowner. It re-emphasized the *non-delegable* aspect of seaworthiness so far as the shipowner is concerned. (emphasis added).¹⁵

Edleman takes a stronger position by stating:

At one time a great deal of importance was placed on the question of whether a shipowner had given over control of an area to an independent contractor at the time of the injury. If

¹² M. NORRIS, MARITIME PERSONAL INJURIES 45, 45 (2d ed. 1966).

¹³ See cases cited in note 4 *supra*.

¹⁴ 205 F.2d 478 (9th Cir. 1953), *aff'd per curiam*, 347 U.S. 396 (1954); See also *Grillea v. United States*, 232 F.2d 919 (2d Cir. 1956).

¹⁵ M. NORRIS, MARITIME PERSONAL INJURIES 46 (2d ed. 1966); see also *Petterson v. Alaska S.S. Co.*, 205 F.2d 478 (9th Cir. 1953), *aff'd per curiam*, 347 U.S. 396 (1954), "The analysis of the relinquishment doctrine . . . shows that its major premise is that the liability of the shipowners to the stevedore is based upon negligence. We have shown that major premise to be incorrect; thus the entire doctrine is incorrect . . ." *Petterson v. Alaska S.S. Co.*, *supra* at 205 F.2d 480.

so, liability was avoided. . . . The doctrine requiring control to find liability in *unseaworthiness* cases involving navigable vessels no longer has any abstract vitality. The cases are clear now that where defective equipment is brought aboard a vessel by an independent contractor, the ship is unseaworthy. Any supervision by the shipowner is irrelevant. Absolute liability results.¹⁶

In holding that the warranty of seaworthiness did not apply, the court in the instant case placed primary reliance upon the case of *West v. United States*,¹⁷ because the owner had relinquished control to the repairing agency. It is the opinion of this writer that the court should not have relied on the *West* decision, for in *West* the vessel was undergoing extended repairs. In *West* the *Mary Austin* was removed from the "moth ball fleet" and turned over to a contractor for a "complete overhaul" so that she could be reactivated and put in condition for sea duty. West was an employee engaged in the reactivation when he was injured. The Court held that the *Sieracki* doctrine did not apply when major repairs were being performed. The vessel was in complete control of the contractor, was not in navigation, had not been in navigation, and had been taken out of maritime commerce. The very plugs which were the cause of the accident were a subject of repair by the contractor, and it was held that no negligence or unseaworthiness could be attributed to the ship owner under the circumstances. The test applied by the Supreme Court was:

the status of the ship, the pattern of the repairs, and the extensive nature of the work contracted to be done, rather than the specific type of work that each of the numerous shore-based workmen is doing on shipboard at the moment of injury.¹⁸

West also held that in some cases control of the vessel is a decisive factor.¹⁹ Norris interprets *West* very narrowly for application and would apply it only when the vessels have been brought in for repairs after removal from lay up. He would restrict the holding to a factual situation similar to the *West* facts.²⁰

¹⁶ P. EDLEMAN, MARITIME INJURY AND DEATH 190, 191 (1960); see also *Mosley v. Cia. Mar. Adra, S.A.*, 314 F.2d 223, 228 (2d Cir. 1963) which states that the control doctrine is "no longer viable."

¹⁷ 361 U.S. 118 (1959).

¹⁸ *Id.* at 122.

¹⁹ *Roper v. United States*, 368 U.S. 20 (1961) relied on *West* and held that the test in this type of case is the status of the vessel; accord, *McDonald v. United States*, 321 F.2d 437 (3rd Cir. 1963), cert. denied, 375 U.S. 969 (1964); 84 A.L.R.2d (for cases following *West*); contra, *Pinion v. Mississippi Shipping Co.*, 156 F. Supp. 652 (E.D. La. 1957), (ship repairman held covered by the doctrine of seaworthiness).

²⁰ M. NORRIS, MARITIME PERSONAL INJURIES 120 (2d ed. 1966).

For the doctrine of seaworthiness to be applicable the vessel must be "in navigation."²¹ This requirement is evidently based on the theory that seamen and those doing seamen's work should be protected against the inherent dangers of their trade. The question of whether or not a vessel is "in navigation" is a question of fact.²² A vessel is "in navigation" when it returns from a voyage and is taken to a drydock to undergo repairs in preparation to making another trip.²³ A vessel may be "in navigation" although it is not actually afloat with a cargo.²⁴ It has been held that a vessel was not withdrawn from navigation when it was tied up for twelve hours to accomplish minor repairs.²⁵ Barges have long enjoyed a navigational status and a vessel in drydock may be without motive power, but is still considered to be "in navigation."²⁶ It is submitted that the barge in the instant case was "in navigation" as distinguished from the complete and major overhaul in *West*. It is a logical conclusion that a ship cannot be considered "in navigation" when it is undergoing a major overhaul for the express purpose of making it possible to return to navigation.²⁷ One important factor in determining whether or not a vessel is "in navigation" is the status of the ship at the time.²⁸

It is submitted that in the instant case the barge was unseaworthy at the time it was delivered to the repairing agency, since apparently the hatch cover was left open when the owner was exercising physical control over the barge. It has been held that the vessel owner must deliver the vessel to the drydock in a safe condition and that the owner

²¹ "For the doctrine of seaworthiness to apply . . . two fundamental elements must be present: (a) the obligation of a seaworthy vessel be owed to the injured person, and (b) the vessel be in navigation. *M. NORRIS, MARITIME PERSONAL INJURIES* 117 (2d ed. 1966), citing *Owens v. United States*, 1958 A.M.C. 216 (D.C. Fla. 1957); accord, *West v. United States*, 361 U.S. 118 (1959); *Latus v. United States*, 277 F.2d 264 (2d Cir. 1960), cert. denied, 364 U.S. 827 (1960); *Kissinger v. United States*, 176 F. Supp. 828 (E.D.N.Y. 1959).

²² *M. NORRIS, MARITIME PERSONAL INJURIES* 117 (2d ed. 1966).

²³ 1 *M. NORRIS, THE LAW OF SEAMEN* 12 (2d ed. 1962), citing *Lawlor v. Socony-Vacuum Oil Co., Inc.*, 275 F.2d 599 (2d Cir. 1960); *Hunt v. United States*, 17 F. Supp. 578 (S.D.N.Y. 1936), aff'd per curiam, 91 F.2d 1014 (2d Cir. 1937), cert. denied, 302 U.S. 752 (1937); *Hawn v. American S.S. Co.*, 107 F.2d 999 (2d Cir. 1939); *Carumbo v. Cape Cod S.S. Co.*, 123 F.2d 991 (1st Cir. 1941).

²⁴ *Hunt v. United States*, 17 F. Supp. 578 (S.D.N.Y. 1936), aff'd per curiam, 91 F.2d 1014 (2d Cir. 1937), cert. denied, 302 U.S. 752 (1937).

²⁵ *Schell v. Chesapeake & O. Ry.*, 395 F.2d 676 (4th Cir. 1968).

²⁶ See *Lawlor v. Socony-Vacuum Oil Co.*, 275 F.2d 599 (2d Cir. 1960); *Carumbo v. Cape Code S.S. Co.*, 123 F.2d 991 (1st Cir. 1941) (dictum); *Hunt v. United States*, 17 F. Supp. 578 (S.D.N.Y. 1936), aff'd, 91 F.2d 1014 (2d Cir. 1937), cert. denied, 302 U.S. 752 (1937).

²⁷ *Evans v. Pan Am. Tankers Corp.*, 261 F. Supp. 633 (E.D. Va. 1966); *Berryhill v. Pacific Far East Line, Inc.*, 238 F.2d 385 (9th Cir. 1956), cert. denied, 354 U.S. 938 (1956); *Raidy v. United States* 252 F.2d 117 (4th Cir. 1958), cert. denied, 356 U.S. 473 (1958); see 84 A.L.R.2d 634.

²⁸ *Roper v. United States*, 368 U.S. 20 (1961); *West v. United States*, 361 U.S. 118 (1959); see cases cited *supra* note 18.

must exercise due care "to provide a reasonably safe place to work for those who foreseeably will come aboard to service the vessel. . . and the crucial time of control [is] the creation of the dangerous conditions."²⁹ The Fourth Circuit in *White v. United States* stated that "[W]e read *West v. United States* . . . as limited to instances in which the work of repair created the unsafe condition."³⁰ Thus it appears that the *West* doctrine would not apply if the vessel was not delivered to the drydock in a reasonably safe condition. The court seems to be saying that the control element is important and controlling only if the unsafe condition was solely created by the repairing agency. The vessel owner in *Mack v. United States*³¹ was also held liable to a repair worker for a dangerous condition caused by the owner, although the ship was in the custody of the repair yard. *Morrell v. United States*³² is a similar case wherein a repairyard worker injured on a vessel in the shipyard undergoing normal overhaul was entitled to the warranty of seaworthiness. It is the opinion of this writer that the decision in the instant case is in conflict with the other various circuits.³³

Furthermore maritime workers have even been granted the warranty of seaworthiness for injuries occurring on a dock and having only the most tenuous connection to the ship. In *Spann v. Lauritzen*,³⁴ a longshoreman recovered when he was injured by a faulty hopper owned by his independent contractor employer, and located entirely on the pier. By analogy the independent contractor created a large portion of the unsafe condition, yet control was not surrendered by the shipowner as *West* would recognize. As a sidenote at this point, it should be remem-

²⁹ *Van Horn v. Gulf Atl. Towing Co.*, 388 F.2d 636, 638-39 (4th Cir. 1968).

³⁰ 400 F.2d 74, 76 (4th Cir. 1968).

³¹ 105 F. Supp. 149 (D.C. Mass. 1952).

³² 297 F.2d 662 (9th Cir. 1961).

³³ *Second Circuit*: In *Albanese v. N. V. Nederl Amerik Stoomv. Maats*, 392 F.2d 763, 764 (2d Cir. 1968) the court said, "regardless of the shipowner's control or lack of it, he still has a nondelegable duty to use reasonable care to keep the area a safe one in which to work." The court stated that this could be the basis of either a negligence or seaworthiness action; *Mosely v. Cia. Mar. Adra S.S.*, 314 F.2d 223 (2d Cir. 1963), *cert. denied*, 375 U.S. 835, held that a vessel with inadequate lighting for loading cargo was unseaworthy.

Third Circuit: *Crawford v. Pope & Talbot, Inc.*, 206 F.2d 784 (3rd Cir. 1953) held that inadequate lighting formed the basis of unseaworthiness to a shoreside worker employed to clean deep tanks of a vessel.

Fourth Circuit: *White v. United States*, 400 F.2d 74 (4th Cir. 1968); *Van Horn v. Gulf Atl. Towing Co.*, 388 F.2d 636 (4th Cir. 1968); *cf.* adequate lighting may render vessels unseaworthy, *Blankenship v. Ellerman's Wilson Line N.Y., Inc.*, 265 F.2d 455 (4th Cir. 1959); *Ross v. Steamship Zeeland*, 240 F.2d 820 (4th Cir. 1957).

Sixth Circuit: *Pioneer S.S. Co. v. Hill*, 227 F.2d 262 (6th Cir. 1955), held that an unguarded "hole" and inadequate lighting could support a finding of unseaworthiness.

Ninth Circuit: *Pacific Far East Lines, Inc. v. Williams*, 234 F.2d 378 (9th Cir. 1956), *cert. denied*, 352 U.S. 871 held that inadequate lighting could be the basis for unseaworthiness.

³⁴ 344 F.2d 204 (3d Cir. 1965), *cert. denied*, 382 U.S. 938 (1965).

bered that if the employee is working directly for the shipowner, his recovery is limited to compensation under the Longshoreman's and Harbor Workers' Compensation Act.³⁵

There appears to be a tremendous contradiction in policy to allow recovery based on the unseaworthiness of shore-based equipment owned by an independent contractor and then not to allow recovery because a vessel undergoing minor repairs on a drydock is deemed to be out of navigation and in the control of an independent contractor. It is submitted that the expansion of the seaworthiness doctrine was largely a result of policy considerations as to whom the court wanted to bear the burden of the risk created.³⁶ This view was essentially the view of the Supreme Court when it said: "Those risks are avoidable by the owner to the extent they may result from negligence. And beyond this he is in a position, as the worker is not, to distribute the loss in the shipping community which receives the service and should bear its cost."³⁷ The opinion emphasized the risks undertaken by maritime workers and the need to protect those who assume a high risk of injury. If the worker is assuming the risks of a seaman, why not put him in the same position as a member of the crew in relation to the warranty of seaworthiness? The duty and warranty to seamen is absolute and non-delegable, and no amount of care of prudence excuses the owner.³⁸ Judge Denman in *Petterson* expressed a similar view when he said that "It cannot be assumed . . . that the stevedore should lose this protection merely because his immediate employer had temporarily assumed control of a portion of the ship without becoming owner *pro hac vice*."³⁹ A shipowner may take advantage of specialized labor (such as appellant in the instant case), but "He is not at liberty by doing this to discard his traditional responsibilities."⁴⁰ An eminent authority in the field has stated that if *Petterson* is construed broadly the shipowner's liability would extend "to all injuries caused by unseaworthiness whenever and wherever arising."⁴¹ The modern economic arrangements for organizing work parties (a drydock as in the instant case) should not excuse the traditional responsibilities of the shipowner if the purpose remains.

There has been a paucity of decisions interpreting a factual situation analogous to the instant case, and an acknowledgement by the Supreme Court on the pending *Petition for Writ of Certiorari* would be an aid in clarifying an area of the law that is at best obscure. It is submitted that if the Supreme Court continues to provide the "humanitarian" protection of the warranty of seaworthiness to all engaged in maritime service, the appellant should be allowed to take advantage of the general maritime warranty of seaworthiness. It is further submitted

³⁵ 33 U.S.C. § 905 (1965).

³⁶ Comment, RISK DISTRIBUTION AND SEAWORTHINESS, 75 YALE L.J. 1174 (1966).

³⁷ *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 94 (1946).

³⁸ *Cox v. Esso Shipping Co.*, 247 F.2d 629, 636 (5th Cir. 1957); see *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 100 (1946).

³⁹ *Petterson v. Alaska S.S. Co., Inc.*, 205 F.2d 478, 480 (9th Cir. 1953).

⁴⁰ *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 100 (1946).

⁴¹ G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 328 (1957).

that the Supreme Court did not intend the doctrine of control as stated in the *West* case to be construed as a rigid test in determining recovery in these types of cases. To allow control to be decisive would be analogous to allowing "privity" to be determinative in products liability cases. The "humanitarian" trend should be an element in that the loss may be spread through the party who is most able to spread the loss throughout the industry.

Chief Judge Brown in his concurring opinion in the instant case states that physical possession and control alone does not extinguish the warranty of seaworthiness.⁴²

Ernest Lane, III

CONSTITUTIONAL LAW—PRIVATE RACIAL DISCRIMINATION

During the October Term of 1967, the United States Supreme Court issued perhaps the most far reaching decision to date in the field of racial discrimination. The Warren Court, which has drawn criticism from many conservatives for what they consider to be a legislative approach, conceivably launched a new era. The case under consideration is *Jones v. Alfred H. Mayer Co.*¹ and the subject is the thirteenth amendment to the United States Constitution.² In this case, plaintiffs, a Negro husband and Caucasian wife, brought suit in the Federal District Court for the Eastern District of Missouri alleging that defendants refused to sell them a home in the Paddock Woods community of St. Louis County for the sole reason that petitioner Joseph Lee Jones is a Negro. It was alleged that this was a denial of their rights guaranteed by the thirteenth and fourteenth amendments, and as declared in 42 U.S.C. §1982 (1964). The plaintiffs joined as defendants (1) the subdivision developer and home builder, (2) the corporate real estate broker, (3) the country club for use of the people in the subdivision. The three corporate defendants were chartered under the laws of Missouri and the subdivision received many services from the state and municipal governments. Defendant's motion to dismiss was sustained for failure to state a claim over which the court had jurisdiction.³ The Eighth Circuit Court of Appeals affirmed, concluding that §1982 applies only to state action and does not reach private refusals to sell.⁴ The Supreme Court

⁴² *Moye v. Sioux City & N.O. Barge Lines, Inc.*, 402 F.2d 238, 241 (5th Cir. 1968).

¹ *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

² U.S. CONST. amend. XIII; Section 1. "Neither slavery nor involuntary servitude except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." Section 2. "Congress shall have power to enforce this article by appropriate legislation."

³ *Jones v. Alfred H. Mayer Co.*, 255 F. Supp. 115, 130 (E. D. Mo. 1966).

⁴ *Jones v. Alfred M. Mayer Co.*, 379 F.2d 33 (8th Cir. 1967).

reversed and held that §1982⁵ bars all racial discrimination, private as well as public, in the sale or rental of property, and that the statute is a valid exercise of the power of Congress to enforce the thirteenth amendment. The Court stated there was no conflict with the Fair Housing Title (Title VIII) of the Civil Rights Act of 1968,⁶ since §1982 deals only with racial discrimination and is not concerned with discrimination on grounds of religion or national origin.

Section 1982 was enacted originally as part of the Civil Rights Act of 1866⁷ and was re-enacted in 1870. The 1866 Act was enacted to put into effect the thirteenth amendment, and it was enacted prior to the fourteenth amendment. The thirteenth amendment makes no reference to the duties of the states and for that reason some members of Congress supported the fourteenth amendment so as to eliminate all doubt as to the constitutional validity of the Civil Rights Act of 1866 as applied to the states. The Court said that this does not mean that the subsequent re-adoption of the Civil Rights Act in any way limited its application to state action. The Court also stated that section one was meant to prohibit all racially motivated deprivations of the rights enumerated in the statute, while only those under color of law were to be criminally punishable under section two.

The Court could have found the necessary "state action" which the Court has so often required under the fourteenth amendment.⁸ The concept of "state action" is firmly embedded in the fourteenth amendment since 1875 when it was said in *United States v. Cruikshank*, that the fourteenth amendment "does not . . . add anything to the rights which one citizen has under the Constitution against another."⁹ This theory was continued with the *Civil Rights Cases*¹⁰ where state action

⁵ 42 U.S.C.A. § 1982: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

⁶ Pub. L. 90-284, 82 Stat. 73.

⁷ Civil Rights Act of April 9, 1866, Ch. 31. § 1, 14 Stat. 27 (1866):

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

⁸ *Shelly v. Kraemer*, 334 U.S. 1 (1948); *Barrows v. Jackson*, 346 U.S. 249 (1953); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Evans v. Newton*, 382 U.S. 296 (1966).

⁹ 92 U.S. 542, 554-55 (1875).

¹⁰ 109 U.S. 3 (1883).

was considered only state legislative acts or actions by officers and agents of the state. Now even state inaction is considered a violation. Mr. Justice Harlan, dissenting in the *Civil Rights Cases*, contended that when acting under section five of the fourteenth amendment, enforcing the first sentence of section one granting citizenship, Congress is not limited to legislation restricting state action.¹¹ This argument was presented and rejected by the district court in *Jones*¹² but could easily have been accepted in that the creation of a large subdivision, although privately organized and financed, is essentially the performance of a government function.¹³ Mr. Justice Douglas' concurring opinion in *Reitman v. Mulkey*¹⁴ stated that a state licensed real estate agency is affected with a public interest and is required by the equal protection clause to act in a non-discriminatory manner. The distinction appears to be Justice Frankfurter's view: "The vital requirement is State responsibility."¹⁵

The Court could have considered §1982 as an act of Congress pursuant to section five of the fourteenth amendment, the enforcement clause, and therefore free of the "state action" limitation. In *United States v. Guest*¹⁶ Mr. Justice Clark said that there was no doubt that section five empowers Congress to enact legislation which would punish all conspiracies that interfere with fourteenth amendment rights, with or without state action. In several decisions the state action restriction was overcome by relying on the commerce clause.¹⁷ The Court said in *Hurd v. Hodge*¹⁸ that RS. 1978 (now §1982) applies under the fourteenth rather than the thirteenth amendment, and that in the absence of congressional legislation, there is no indication that the refusal to sell property to a Negro violates the thirteenth amendment.

The fourteenth amendment would have been the most available vehicle upon which to carry the complainants to relief. Previously, in order to invoke the fourteenth amendment, the Court had to find some state action. Here the thought emerges as to why the *Jones* Court based its decision on the thirteenth amendment. The position taken by the Court in the *Jones* case suggests that the Court is now unwilling to extend the "state action" doctrine any further but is unable to eliminate the requirement from the fourteenth amendment. In order to prohibit acts of racial discrimination, the Court had to apply §1982 under the thirteenth amendment. The relief specifically sought by plaintiff in the *Jones* case was soon to arrive anyway under the Civil Rights Act of

¹¹ *Id.* at 54.

¹² See note 3.

¹³ *Marsh v. Alabama*, 326 U.S. 501 (1946).

¹⁴ 387 U.S. 369, 386 (1967).

¹⁵ *Terry v. Adams*, 345 U.S. 461, 473 (1953).

¹⁶ 383 U.S. 745, 762 (1966) (Clark, J., concurring opinion, joined by Black and Fortas, J. J.).

¹⁷ *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

¹⁸ *Hurd v. Hodge*, 334 U.S. 24 (1948).

1968.¹⁹ It is contended that the Court has chosen to now use the thirteenth amendment in place of all the many superfluous doctrines that have been utilized to obtain one result—the end of all racial discrimination.

In order to accomplish their purpose of ending all racial discrimination it seems that the Court has three choices. The first choice is to use 42 U. S. C. §1981, 1982 (then Revised Statutes §§1977, 1978, derived from section one of the Civil Rights Act of 1866) as a means to eliminate all racial discrimination. The second choice is to establish a broad constitutional pronouncement that racial discrimination is a direct violation of the thirteenth amendment, and then wait for congressional approval and specifications as to what constitutes racial discrimination. The third choice is for the Court to establish the rights which are so basic and fundamental that they may be applied directly to an individual through the thirteenth amendment.

By applying the provisions of the Civil Rights Act of 1866 through §§1981 and 1982, the Court may, by very liberal interpretation, end all racial discrimination with respect to all property, real and personal, and with respect to the making and enforcement of all contracts. There is very little intercourse concerning human events which does not relate, touch or concern property, in some form, or does not involve some oral or written contract.

Would this mean that a will which includes a racial discrimination clause would be a deprivation of "the same right . . . to inherit"? Section 1981 provides that all persons in the United States "shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens" The Court's construction of this statute could prevent a private club, fraternal organization, private school, as well as restaurants and hotel management, from refusing on grounds of race to "make a contract" for services with a Negro. Should the Court adopt such a liberal construction, many of the benefits provided by various civil rights acts enacted from 1957 through 1968 would be superfluous in cases involving racial discrimination. For example the 1968 Civil Rights Act provides for a maximum of \$10,000 compensatory damages, whereas the limitation is removed under §1981 and §1982. However, in all cases the temporary and permanent injunction remains the most effective and immediate relief.

The second choice is based on the manner by which the Court limited its role in the early school desegregation cases. In *Brown v. Board of Education* the Court stated: "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted We must consider public education in light of its full development and its present place in American life throughout the Nation. Only in this way

¹⁹ Fair Housing Title of the Civil Rights Act of 1968; Civil Rights Act of 1968, tit. VIII, 42 U.S.C.A. §§ 3601-19 (Supp. 1968), which prohibits discrimination in the sale or rental of about 80 percent of all housing when full in effect by 1970. In this case defendant utilized a real estate agent in selling his houses which made his action a violation under this act.

can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws."²⁰ The Court in broad sweeping language merely enunciated fundamental rights and became an exponent of guiding principles while skillfully refraining from specifying just how their mandates should be carried out. The Court has clearly moved away from its pre-Civil Rights Act role and is now taking a more active involvement in the particulars of school desegregation. Once the passage of the Civil Rights Act of 1964²¹ indicated that Congress was willing to act on the mandates of the judiciary, the Court could feel free to involve itself more intimately in necessary implementation. The Court has now signaled Congress that it is ready to face the problem of "private" discrimination. In the *Civil Rights Cases*²² the Court decided that the thirteenth amendment authorizes Congress not only to outlaw all forms of slavery and involuntary servitude but also to eradicate the last vestiges and incidents of a society half slave and half free, by securing to all citizens, of every race and color, "The same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed [by] white citizens." The Court felt that it was tied to the fourteenth amendment and chose not to extend or apply the thirteenth. Heretofore the Court has regarded the thirteenth amendment as merely freeing the Negro from the physical bonds of slavery. The Court also stated in *The Civil Rights Cases* that, "It would be running the slavery argument into the ground, to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business."²³ But as the Court stated in *NLRB v. Hearst Publications, Inc.*, a statute "must be read in the light of the mischief to be corrected and the end to be attained."²⁴ The Court in identifying that end in 1968 has felt it necessary to extend its 1870 definition.

It now seems that the Court is going to attack the problem through the one amendment in the Constitution which was designed for just such a problem. The Court indicates that these rights have existed from their inception, but the Court has not made it clear as to whether these rights are statutory rights or whether these rights are so basic that they are embedded in the United States Constitution and as such will be enforced directly by the Court itself. In any case the Court has expressly indicated that it will approve of congressional legislation in the area of private racial discrimination. In *Jones*²⁵ the Court said:

"By its own unaided force and effect," the Thirteenth Amendment "abolished slavery, and established universal freedom."
Civil Rights Cases, 109 U. S. 3, 20. . . . Whether or not the

²⁰ 347 U.S. 483, 492-93 (1954).

²¹ Civil Rights of 1964, Pub. L. No. 88-352, 78 Stat. 241.

²² 109 U.S. at 22.

²³ *Id.* at 24-25. Quoted in *Jones v. Alfred H. Hayer Co.*, 392 U.S. at 441.

²⁴ 322 U.S. 111, 124 (1944).

²⁵ *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968).

Amendment *itself* did any more than that—a question not involved in this case—it is at least clear that the Enabling Clause of that Amendment empowered Congress to do much more. For that clause clothed “Congress with power to pass *all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.*” *Ibid.*

The Court also said, “Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.”²⁶ The Court went on to say: “At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep.”²⁷ From this language it is clear that Congress can legislate to eliminate private racial discrimination on the theory that it is a “badge,” a remnant, of slavery. The Court indicates that Congress must take the responsibility for enacting this legislation, but it also indicates much more. The Court has left the door open for the third choice.

The Court implies that it is willing to apply these basic and fundamental rights directly to the individual with or without any Congressional action. The Court said that the question of whether the thirteenth amendment itself did more than merely abolishing slavery and establishing universal freedom is a question which was not presented by this case.²⁸ It is contended that the Court may well choose to be an active participant in the elimination of private racial discrimination rather than limiting its action by being a mere passive spectator. The Court implies a recognition of the fact that there can not be an individual who is half-free or who is a half-slave. As Mr. Justice Douglas stated in his concurring opinion: “Today the black is protected by a host of civil rights laws. But the forces of discrimination are still strong.”²⁹ He also specifies many of the “badges” of slavery which still remain today in spite of the efforts of Congress to legislate in this area.³⁰

The time is ripe for the Court to enforce the basic and fundamental rights which are firmly entrenched within the fortified walls of the thirteenth amendment. The Court has given indication that these rights will be enforced on a case-by-case basis and whether it is public or private, substance or procedure, racial discrimination will be treated under no other name. This will have a far greater effect than in the early school desegregation days. When the *Brown v. Board of Education* opinion was handed down by the Court, the Negro did not have a practical way of enforcing his rights. There was no congressional legislation whereby the federal government could enforce his rights and the Negro was econom-

²⁶ *Id.* at 440.

²⁷ *Id.* at 443.

²⁸ See note 24.

²⁹ 392 U.S. at 447.

³⁰ *Id.* at 445-46.

ically unable to pursue his rights through the courts and their expensive remedies. Today the Negro is more financially able to support himself and there are many organizations dedicated to the purpose of achieving the Negro his rights. It is submitted that should the Court choose this third choice as their plan of action; the results will be more immediate in establishing the specifics as to what constitutes racial discrimination and the "badges" of slavery.

Although the *Jones* Court specifically addressed its decision to private racial discrimination involving the sale or rental of property and expressly said that this was a violation of §1982, the possible ramifications of this case are many. It could mean that the first choice will be utilized and that all racial discrimination violates either §1981 or §1982. It seems more logical, however, that this case simply is a preface to an entirely new and different way of approaching the discrimination problem. In using the thirteenth amendment to attain the objective, it is possible that the Court will treat the fourteenth amendment as unnecessary and thus escape the restraints of the many varied doctrines which the Court has been bound under the fourteenth amendment. It is suggested that the Court will follow the second choice and give Congress a chance to legislate in this area. But if Congress is slow to heed the call or should Congress refuse to follow, it seems likely that the Court will progress to the third choice. The Court indicates that it is imperative for Congress to respond before any progress may be attained in this area. The *Jones* Court states: "If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation *cannot* keep." (emphasis added).³¹ This statement indicates that the second alternative is the most appropriate for the moment. However, the Court has clearly expressed their opinion that private racial discrimination is inherently unjust and that judicial relief will be forthcoming.

William P. Dodson

³¹ *Id.* at 443.

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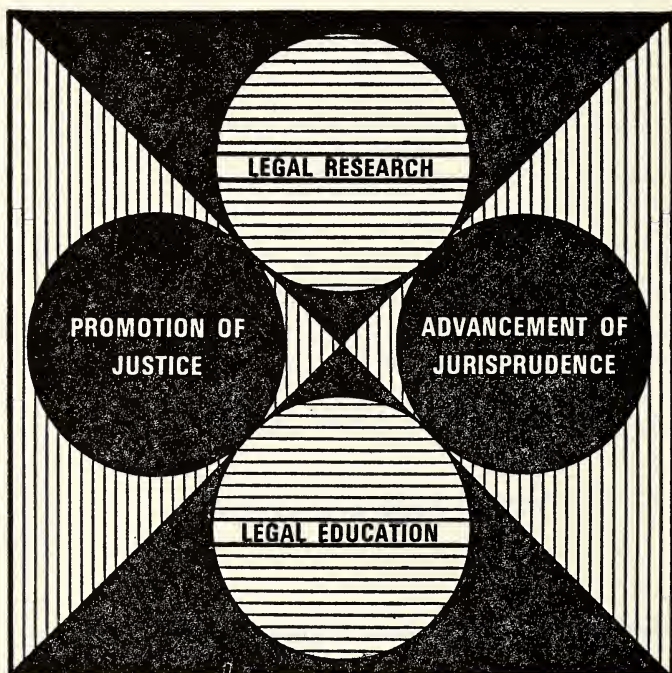
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